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In the
Supreme Court of the United States

OCTOBER TERM, 1948

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners, *Petitioners*,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY, *Respondent*,

A. J. GOERIG and CLYDE PHILP, individuals and copartners, *Defendants*,

CONTINENTAL CASUALTY COMPANY, a corporation, *Additional Petitioner*.

PETITION OF SAM MACRI, DON MACRI AND JOE MACRI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

TOM W. HOLMAN,
S. W. BRETHORST
Attorneys for Petitioners
Sam Macri, Don Macri and Joe Macri
1710 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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No. .....

PETITION OF SAM MACRI, DON MACRI AND JOE MACRI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Sam Macri, Don Macri and Joe Macri, individuals and copartners doing business as Macri Company, pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on February 11, 1949 (R. 2274), after denial of petition for rehearing on April 5, 1949 (R. 2275), affirming the judgment of the United States District Court for the Eastern District of Washington, Southern Division (R. 112).

STATEMENT OF THE CASE

The United States Court of Appeals for the Ninth Circuit in this statutory federal proceeding under the *Miller Act* (U.S.C.A., Title 40, sec. 270a, 270b; 49 Stat. 793, 794) has declared, as pertaining to the petitioners Macri, that "* * * we should decide this issue as would a state court in Washington. Since all the relevant facts regarding this subcontract have occurred in Washington, the Washington substantive law of contracts is applicable * * *" (R. 2267). The Court of Appeals then decided one important question of local law, *i.e.*, the correct basis for compensation for breach of subcontract, contrary to the controlling Washington decisions. It made no decision on another important question of local law, squarely before it (R. 140), *i.e.*, the use plaintiff's disqualification under state law and state authorities to prosecute the action.

It attributed to these petitioners Macri reliance on one of such court's own former opinions (R. 2269), although that case was neither cited nor argued by petitioners at hearing or by any adverse parties. The Court of Appeals used a major portion of its opinion on the issue affecting petitioners Macri, in distinguishing such court's own former case (R. 2269-70). It did not discuss, cite or distinguish, but wholly ignored, and cited no similar case of final authority in lieu of, the case of *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 70 L.ed. 938, upon which petitioners Macri did principally rely as the applicable decision of this Supreme Court of the United States. The Court of Appeals thereby has also decided a federal question

in a way which is in conflict with the applicable decisions of the Supreme Court of the United States.

The trial court gave judgment for the use plaintiff Schaefer (R. 113) and *unconditionally, instead of conditionally* gave judgment for the same amount, plus attorneys' fees, to Macri's surety, the petitioner Continental Casualty Company (R. 114). The Court of Appeals failed to correct so as to protect petitioners Macri from double liability of amount fixed by the trial court (R. 2266-7). This was done in spite of the surety's statement in its reply brief in that court that "Continental now states and makes a matter of record that it has never had and does not now have any objection to its judgment over against the cross appellants being either construed or amended as conditional on the non-payment of the judgment by them" (Cont. Reply Brief, Ct. App., p. 1; Appellate Court Cause No. 11707).

The action in question was brought by the United States for the use of M. C. Schaefer, dba Concrete Construction Company (hereinafter referred to as Schaefer), against Sam Macri, Don Macri and Joe Macri, individuals and copartners doing business as Macri Company, the principal contractors on the public work in question (hereinafter called Macri), Macri's surety, Continental Casualty Company (hereinafter called Continental), and Macri's joint adventurers for the public work in question, A. J. Goerig and Clyde Philp. Schaefer sued for $57,618.87 damages for alleged breach of his subcontract by Macri.

At the conclusion of a protracted non-jury trial the district court rendered a lengthly oral decision,

made findings, denied defendants' motions for judgment and for new trial, gave Schaefer judgment for $56,764.97, plus 6% interest from May 1, 1947, and $921.70 costs against Macri and Continental, only $853.90 less principal than the total sued for by Schaefer (R. 12, 94, 112-113, 115-117, 2208-30). The court carried the same judgment against Macri, plus $1750.00 attorneys' fees, unconditionally in favor of Continental, as Macri's surety (R. 114). Macri and Continental appealed to the Court of Appeals for the Ninth Circuit (R. 136, 118), which affirmed the district court judgment (R. 2273).

The Schaefer judgment figure of $56,764.97 was arrived at by taking the $89,498.71 summary of Schaefer's alleged total job cost (without admitting his books and accounts as sought by petitioners Macri R. 2202), and deducting therefrom only the $32,614.66 paid in current estimates by Macri to Schaefer (R. 78, 104, 1241-2, 1252-1264). There were erroneously included in such $89,498.71 items of 20% overhead, amounting to $13,582.82 (R. 1258), and 10% profit, amounting to $8,203.05 (R. 1261), and included in the net $56,764.97 judgment figure.

The Court of Appeals did not correct this manifest duplication of such 20% overhead and 10% profit on the $32,614.66 paid by estimates accepted by Shaefer throughout job progress (Pltf. Ex. 63; R. 1241-2, 1252-1264, 2270). All this was allowed to stand, despite an admitted 14.5% overrun of concrete by Schaefer (R. 1512) through admittedly unskillful subcontract operations therein (R. 1205, 1207). The judgment amount of $56,764.97 was more than 7½

times the total government payments of $7,694.13 for performance of all correlated items to the two bid items in the Schaefer subcontract. Such net judgment was $32,770.43 more than the total paid by the government for both the Schaefer two subcontract items and all of the correlated items. *Yet Macri, and not Schaefer, performed all such correlated items.*

The *Miller Act* (U.S.C.A., Title 40, sec. 270a, 270b; 49 Stat. 793, 794) was used as the vehicle for suit by Schaefer, suing as a sole trader dba Concrete Construction Company, without his having complied with the Washington law requiring proof of filing of certificate of assumed trade name as a prerequisite for any suit (Rem. Rev. Stat., Sec. 9980). Schaefer sued as a subcontractor under a subcontract in name of Concrete Construction Company, as an assumed trade name, in the Federal Court for the Eastern District of Washington, Southern Division. The objection to his being disqualified as a plaintiff was raised in a timely manner by petitioners Macri in both the district court (R. 2205) and in the Court of Appeals (R. 140), but it was waived aside without comment by either court (R. 94-115, 2264-2273).

Schaefer fully performed his subcontract and petitioners Macri fully performed their principal contract on the government work in question. No additional work or materials to those called for by the principal contract went into the public work. *Schaefer did not sue for any additional items of work or materials.* Instead, he claimed for alleged breach of his contract by Macri. He sued on a *quantum meruit* theory for alleged reasonable value of services per-

formed. He actually prosecuted a damage suit, not in the state court where it belonged, but in the federal district court, with the *Miller Act* (U.S.C.A., Title 40, sec. 270a, 270b; 49 Stat. 793, 794) as his only entree. Lack of jurisdiction so to do was submitted to but passed by the Court of Appeals without comment thereon (R. 2264-2273; Macri Opening Brief Ct. of App., pp. 1, 61; Macri Reply Brief, p. 1).

Macri had executed a principal contract on December 7, 1943, with the United States for a federal irrigation construction project, designated as a portion of the Roza Division, Yakima Project, near Yakima, Washington, for a total contract price on unit bids of $128,550.95 (Pltf. Ex. 1; R. 96, 158, 172). The Continental executed with Macri the requisite statutory "payment bond" in the penal sum of $64,275.48 (Continental Ex. 10). Goerig and Philp had signed a joint venture agreement to provide for distribution of profits or assumption of losses (Macri Ex. 7).

Macri signed with Schaefer on March 14, 1944, a subcontract calling for Schaefer to perform only 2 of the 26 items bid upon in the principal contract. Schaefer agreed thereby to do only the concrete work, for an agreed price of $26 per cubic yard of concrete placed. The public work consisted of laterals and sublaterals to the main canal, with boxes for diversion of water therefrom. Schaefer's subcontract pertained only to the installation of these concrete boxes (Pltf. Ex. 5; R. 99, 158, 175). Macri was to do the excavation work and furnish the lumber for the concrete forms, the government furnished the cement, and the concrete work was to be done by Schaefer.

The Schaefer subcontract (Pltf. Ex. 5) in coordination with a similar provision in the Macri principal specifications (Pltf. Ex. 2) provides for a definite notice of any claim of neglect or default. That is found in paragraph 5 of such subcontract, and reads:

> "If the work hereunder shall be delayed by any act, neglect or default of the Owner or of the Principal Contractor upon the entire work, * * * the Subcontractor shall give the Principal Contractor notice in writing within five days after the occurrence of any such act, omission or event, specifying the fact and cause of delay."

Schaefer did not give Macri any such written notice, or any notice consonant with such paragraph 5 of the subcontract. The trial court found only that Schaefer made oral complaints to Macri, which were disregarded (R. 100-103). *Admittedly, however, Schaefer did not rescind the subcontract. Instead, he completed performance thereof.*

The concrete placed by Schaefer, based on the government's final yardage figures, amounted, at the bid price of $26.00 per yard in place, to the sum of $35,-271.12. Macri had paid Schaefer $32,614.66 thereof prior to suit. That is stipulated by pretrial order (R. 78, 104). That left only $2,656.46 as an unpaid balance of the Schaefer subcontract price (R. 124). That balance was, in any event, distrained by United States Internal Revenue Service notice of levy on any money due Schaefer (R. 105, Macri Ex. 67).

Schaefer's evidence, although disputed by both Reclamation Bureau officers and other competent testimony, was adopted by the district court to find that

Macri breached the subcontract in three particulars: In excavations to accomodate the Schaefer subcontracted irrigation boxes, with delay to Schaefer's carpenters; improperly dressing the excavations in time for Schaefer to proceed with his subcontracted work; and in failing to furnish adequate quality and quantity of lumber as required by Schaefer for the concrete forms.

Schaefer's case and judgment accordingly must actually be based on the following two propositions or fail: (1) For compensation for doing what was not included in the subcontracted concrete work, such as excavation and fine grading in any manner inadequate for the concrete forms; and (2) additional costs actually incurred by Schaefer in performing the subcontracted work by reason of Macri not having proper excavation or earthwork, with fine grading currently ready, and not furnishing form lumber of suitable quality as required, etc.

Schaefer made no attempt to segregate the amount of his claim under the above categories. He claimed that from day to day his men were spending a large amount of their time performing work which Macri should have done, but he kept no track thereof (R. 2154-5-6, 406).

Schaefer did not even make up his payrolls for the government until seven months' time for his contract performance had passed (R. 1373). *He admitted that there was no segregation of costs of performing the subcontracted work and of the claimed additional costs from Macri's alleged breaches or of costs for anything*

he may have done which was not under the subcontract (R. 2154-5, 949, 953, 1298-9, 1368, 1373).

Schaefer's two expert witnesses admitted that the reasonable value of Schaefer's performance would have been his subcontract price, except for Macri's partial breaches of the subcontract (R. 958, 960, 962, 1163).

Petitioners Macri submit that Schaefer's claims constitute damages for breach of contract by Macri and can be nothing else. None of Schaefer's claims is for work required or contemplated to be done by Schaefer under the subcontract. They are claims outside the subcontract instead of for any performance thereunder.

The opinion of the Court of Appeals rests heavily, but without actual foundation, on Macri's "accepting and acting on the oral notices" of Schaefer (R. 2269). The district court, *to the contrary*, denied recovery on Schaefer's claimed substitute express oral contract to pay costs, as alleged in Schaefer's first cause of action (R. 2-10), and rested its judgment on his second cause of action, based strictly on *quantum meruit* (R. 10-12).

The trial court stated, with respect to the above, as follows:

> "In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of

lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer. * * *" (R. 2213)

"*However, the court cannot find under the record here that there was a meeting of the minds, or an express contract* that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. *I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him.* He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think *his conduct isn't consistent with the meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.* * * *" (R. 2214-5) (Italics ours)

The Court of Appeals has manifestly erred in holding that there was any contract, oral or otherwise, subsequent to Schaefer's subcontract. As the trial court pointed out, Schaefer repeatedly stated that he refused absolutely to do any other work than what his subcontract called for, and he continuously complained about Macri's partial breaches of that subcontract.

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction to review the opinion and judgment of the Court of Appeals for the Ninth Circuit in this case by virtue of the U. S. Code, Title 28, Sec. 1254, par. 1.

The opinion and judgment of the Court of Appeals was filed February 11, 1949 (R. 2273, 2274). Macri's petition for rehearing was denied April 5, 1949 (R. 2275).

This petition is filed in a timely manner pursuant to U. S. Code, Title 28, Sec. 2101, par. (c) and (e). The Chief Judge of the Court of Appeals for the Ninth Circuit on April 5, 1949, entered an order staying issuance of mandate pending timely filing of petition for certiorari in this United States Supreme Court under Rule 38, par. 5 (b) of this Court.

QUESTIONS PRESENTED

The principal questions, on each of which the district court held in the affirmative and the Court of Appeals sustained such holding, are:

1. Where the subcontractor Schaefer completely performed his written subcontract on the federal public works job, without written or oral modification thereof, in spite of claimed repeated partial breaches thereof by Macri, as principal contractor, so as to render Schaefer's performance more costly because of delays, and where Schaefer was paid and without protest accepted all payments at the contract rate for his subcontract performance, should Schaefer not be

legally barred from recovery of his alleged total costs of performance, including 20% overhead and 10% profit on the whole subcontract job, on a basis of either implied contract or *quasi* contract?

2. Can Schaefer legally recover on any basis without having proved his additional costs of performing the subcontract by reason of any breach by the principal contractor or without complying with the provision of the subcontract regarding delays, or without having made any attempt to minimize his claimed increased costs?

3 Was not failure of Schaefer to comply with Secs. 9976-9980 of Rem. Rev. Stat., as a prerequisite to suit on a subcontract in an assumed name, a bar to his recovery?

4. Is the amount of recovery sufficiently supported by competent evidence?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

Petitioners Macri rely on the following reasons for allowance of the writ of certiorari herein, pursuant to par. 5(b) of Rule 38 of this Court:

1. The opinion and judgment of the Court of Appeals conflict with applicable local decisions on an important question of local law, *i.e.*, the correct basis for compensation for breach of subcontract, and are contrary to the following controlling Washington State Supreme Court decisions: (Only the remedies for partial breach of contract can apply) *Fry v. Grangers' Warehouse Co.*, 131 Wash. 497, 500, 230 Pac. 423, 424; *Bankers Trust Co. v. Am. Surety Co.*, 112 Wash. 172, 178, 191 Pac. 845,

848; *Mallory v. Olympia*, 83 Wash. 499, 503, 145 Pac. 627, 629; *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 12, 188 Pac. 792, 796; *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 145, 154 Pac. 123, 125; (recovery on either implied or *quasi* contract precluded) *Chandler v. Wash. Toll Bridge Authority*, 17 Wn.(2d) 591, 604, 137 P.(2d) 97, 103; (no recovery allowed in *quasi* contract where there is a valid contract between the parties) *Nelson v. Seattle*, 180 Wash. 1, 9, 38 P.(2d) 1034, 1037; *McBride v. Callahan*, 173 Wash. 609, 628, 24 P.(2d) 105, 112; (rescission and recovery not allowed where there is either full or substantial subcontract performance) *Wray v. Young*, 122 Wash. 330, 334, 210 Pac. 794, 796; *Rozzano v. Moore*, 175 Wash. 566, 571, 27 P.(2d) 1096, 1098; *Marrazzo v. Orino*, 194 Wash. 364, 378, 78 P.(2d) 181, 187; (recovery on *quasi* contract precluded where there is no segregation of costs from work done under the subcontract) *Nelson v. Seattle*, 180 Wash. 1, 15, 38 P.(2d) 1034, 1039; *Ross v. Raymer*, 132 Wash. Dec. 131, 140, 201 P.(2d) 129, 135 (decided December 17, 1948); *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 249, 182 P.(2d) 75, 81; *Blakiston v. Osgood Panel & Veneer Co.*, 173 Wash. 435, 440, 23 P.(2d) 397, 399; *Automatic Canteen Company of Washington v. Automatic Canteen Company of America*, 182 Wash. 133, 140, 45 P.(2d) 41, 44; *Hole v. Unity Petroleum Corp.*, 15 Wn.(2d) 416, 424, 131 P.(2d) 150, 153; *Lloyd v. American Can Co.*, 128 Wash. 298, 313, 222 Pac. 876, 881; *Bromley v. Heffernan Engine Works*, 108 Wash. 31, 32, 182 Pac. 929, 930; *Strong & MacDonald v. King Co.*, 147 Wash. 678,

685, 267 Pac. 436, 439; (subcontract price is limit of Schaefer's recovery because of his failure to comply with subcontract terms respecting extra compensation for delayed performance) *Goss v. Northern Pac. Hosp. Ass'n*, 50 Wash. 236, 239, 96 Pac. 1078, 1079; *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 412, 125 P.(2d) 275, 281; (Schaefer's failure to minimize damages prevents his recovering) *Arkley Lumber Co. v. Vincent*, 121 Wash. 512, 515, 209 Pac. 690, 691; *Peninsular Sav. & Loan Ass'n. v. Breier Co.*, 137 Wash. 641, 647, 243 Pac. 830, 832; *Poston v. Western Dairy Products Co.*, 179 Wash. 73, 86, 36 P.(2d) 65, 70; *Hoff v. Lester*, 25 Wn.(2d) 86, 95, 168 P.(2d) 409, 414; *Cannon v. Oregon Moline Plow Co.*, 115 Wash. 273, 278, 197 Pac. 39, 41.

2. The opinion and judgment of the Court of Appeals disregarded and therefore likewise so conflicted with provisions of Washington State statutory prohibitions in Rem. Rev. Stat., Secs. 9976-9980; *McGillivray v. Columbia Salmon Co.*, 104 Wash. 623, 626, 177 Pac. 660, 661; *Sussman v. Mentzer*, 193 Wash. 517, 522, 76 P.(2d) 595, 597.

3. The opinion and judgment of the Court of Appeals disregarded the applicable decisions of the Supreme Court of the United States, thereby deciding, by ignoring such decisions, a federal question in a way in conflict with such applicable decisions. *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 70 L. ed. 938; *U. S. v. Blair*, 321 U.S. 730, 88 L.ed. 1039, 1043-4; *Ingle v. Jones*, 2 Wall. (69 U.S.) 1, 17 L.ed. 762.

WHEREFORE, your petitioners Macri respectfully

pray that a writ of certiorari may issue under seal of this United States Supreme Court directed to the United States Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 11707, Continental Casualty Company, a corporation, appellant, v. United States for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, appellee, and Sam Macri, Don Macri and Joe Macri, and A. J. Goerig and Clyde Philp, appellants, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals affirming the judgment of the United States District Court for the Eastern District of Washington, Southern Division, be reversed by this Honorable Court, and that your petitioners Macri may have such other and further relief in the premises as this Court may deem proper.

Respectfully submitted,

TOM W. HOLMAN

S. W. BRETHORST

Attorneys of record in this Court for Petitioners Sam Macri, Don Macri and Joe Macri, individuals and co-partners.

In the

Supreme Court of the United States

OCTOBER TERM, 1948

No.....

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners, *Petitioners*,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY, *Respondent*,

A. J. GOERIG and CLYDE PHILP, individuals and copartners, *Defendants*,

CONTINENTAL CASUALTY COMPANY, a corporation, *Additional Petitioner.*

BRIEF IN SUPPORT OF MACRI'S PETITION FOR WRIT OF CERTIORARI

STATEMENT

The trial court judgment was entered May 1, 1947 (R. 112-115). Its unpublished opinion is at R.2208, *et seq.* The opinion of the United States Court of Appeals for the Ninth Circuit (R. 2264-73) was rendered and filed February 11, 1949 (R. 2273). It is reported in 173 F.(2d) 5. Judgment in such appellate court was entered February 11, 1949 (R. 2274). Macri's petition for rehearing was denied April 5, 1949 (R. 2275).

JURISDICTION

Title 28, U. S. Code, Sec. 1254, par. 1, provides the Supreme Court of the United States with jurisdiction to review the opinion and judgment of the Court of Appeals for the Ninth Circuit in this case.

The Court of Appeals' opinion and judgment were filed February 11, 1949 (R. 2274), and Macri's petition for rehearing was denied on April 5, 1949 (R. 2275).

The present petition for writ of certiorari directed to such Court of Appeals is filed timely under Title 28, U. S. Code, Sec. 2101, par. (c) and (e). Issuance of mandate was stayed by the Chief Judge of such Court of Appeals entered April 5, 1949, pending the filing of a petition for writ of certiorari by Continental Casualty Company on or before May 16, 1949, and pending final disposition of such petition in this Supreme Court of the United States.

Petitioners Macri also invoke jurisdiction under Rule 38, par. 5(b) of the Supreme Court of the United States.

The federal district court jurisdiction herein was based solely upon the *Miller Act* (U.S.C.A., Title 40, Secs. 270a and 270b; 49 Stat. 793, 794). Schaefer's amended complaint expressly so stated (R. 2, 10). The district court so found (R. 95, 97, 104). The Court of Appeals passed that finding without mention (R. 2264-2273). Petitioners Macri have, in each such district court and such Court of Appeals, raised directly each of the questions enumerated in the foregoing petition for writ of certiorari.

It is, therefore, respectfully submitted that the nature of this case and the opinions of such district court and such Court of Appeals therein directly bring this case within the aforesaid statutory jurisdictional provisions and within the provisions of Rule 38, par. 5(b), for the several specifications thereof, of this Supreme Court of the United States.

STATEMENT OF THE CASE

Petitioners Macri respectfully here adopt and incorporate by reference herein, as part of this brief, their statement of the case in the preceding petition for writ of certiorari, added to in the course of the following argument as may be otherwise indicated.

SPECIFICATIONS OF ERROR

The errors relied on by these petitioners Macri, made by the Court of Appeals for the Ninth Circuit in affirming the district court, and as such errors were initially made by the district court, are as follows:

1. In affirming, by entirely disregarding in its opinion (R. 2264-2273), the district court's denial of Macri's motion for dismissal at the close of Schaefer's evidence (R. 1374-5).

2. In affirming, by entirely disregarding in its opinion (R. 2264-2273), the district court's denial of Macri's motion for dismissal at the close of all of the evidence (R. 2205-6).

3. In affirming the rejection by the district court of Schaefer's books and records proffered by Schaefer as original entries and not objected to by Macri (R.

2202) (rejected Exs. 52, 53 and 53a to 53h, inc., which Schaefer then withdrew), and resting its affirmation of the district court's judgment upon Pltf. Ex. 63, "* * * a statement of costs prepared by a certified public accountant which showed Schaefer's costs on this project. * * *" (R. 2270), in lieu of such original books and records, such action by both such courts being confiscatory of Macri's inherent rights to have the rejected exhibits available on appeal, and because such Ex. 63 was not the best evidence.

4. In affirming (R. 2268) the district court's finding of fact No. 15 (R. 102-3) and specifically the portion thereof that "* * * there was an implied agreement or *quasi* contract * * *" that Macri would pay Schaefer "* * * the fair and reasonable value of his subcontract under the conditions and with the extra burdens * * *" imposed by Macri, because the same is contrary to the evidence, is contrary to the controlling law of the State of Washington, and particularly is contrary to the terms of the Macri principal contract (Pltf. Ex. 3) and of the Schaefer subcontract (Pltf. Ex. 5).

5. In affirming (R. 2266-7, 2270) the district court's finding of fact No. 16 (R. 103-4) and specifically the finding therein that a reasonable value of $89,498.71, or any other sum except the subcontract price of $34,974.03 less the $32,614.66 paid by Macri thereon to and accepted by Schaefer under job progress and final estimates (Item 12 on Pltf. Ex. 14), and with such balance of $2,359.37 of subcontract payment due being distrained by the U. S. Treasury Department, Internal Revenue Service, notice of levy

of tax lien against Schaefer (R. 1105, ff. 20), because said finding is contrary to the controlling law of the State of Washington, is contrary to any substantial evidence, and to the terms of the Macri principal contract (Pltf. Ex. 3) and the Schaefer subcontract (Pltf. Ex. 5).

6. In affirming (R. 2270) the district court's conclusion of law No. 1 (R. 109-10) that Schaefer should recover judgment against Macri for $56,764.97 with interest and costs, or any other sum except the balance of $2,359.37 subcontract price subject to aforesaid tax levy (R. 105) against Schaefer thereon, because Macri is not legally liable for more than the subcontract price, and because both such conclusion of law No. 1 and such affirmation thereof by the Court of Appeals are contrary to the provisions of the Macri principal contract (Pltf. Ex. 3) and the Schaefer subcontract (Pltf. Ex. 5), and are contrary to the controlling law of the State of Washington.

7. In affirming (R. 2226-7, 2270) the district court's conclusion of law No. 3 (R. 110) as an unconditional judgment against Macri in favor of Continental instead of a judgment conditioned upon Continental being required to pay the $56,764.97 specified therein, despite Continental's disavowal to such Court of Appeals of any claim by it to an unconditional judgment in its favor (Continental reply brief, Ct. App., p. 1; Appellate Court cause No. 11707).

8. In affirming, by disregarding in its opinion (R. 2264-2273), the district court's conclusion of law No. 8 (R. 111) as based on such district court's finding No. 2 (R. 95) and Pltf. Ex. 59, because Schaefer

did not timely file a certificate of assumed trade name in the county and district of the State of Washington in which the public work was performed (R. 140, 179, 180, 670-3), and because said conclusion of law is contrary to Secs. 9976-9980, Rem. Rev. Stat. of Washington, is contrary to the controlling law of the State of Washington, and, also contrary to the applicable decisions of the Supreme Court of the United States.

9. In affirming the failure of the district court to grant Macri's motion to dismiss Schaefer's action for failure to file a certificate of assumed trade name of Concrete Construction Company until after commencement of trial (R. 179) and until after motion to dismiss, for want of such compliance with Secs. 9976-9980, Rem. Rev. Stat. of Washington, had been interposed by Macri (R. 140, 179, 180, 670-673), because such affirmation by the Court of Appeals is contrary to the controlling law of the State of Washington and is contrary to the applicable decisions of the Supreme Court of the United States.

10. In affirming any judgment of the district court for Schaefer where Schaefer had failed to comply with Secs. 9976-9980, Rem. Rev. Stat. of Washington, pertaining to prerequisite filing of Schaefer's assumed trade name of Concrete Construction Company before bringing this action against Macri, because such affirmation by the Court of Appeals is contrary to the controlling law of the State of Washington and is contrary to the applicable decisions of the Supreme Court of the United States.

11. In affirming the failure of the district court to provide in its judgment (R. 112-115) for any protection to Macri against the U. S. Treasury Department levy on any funds due Schaefer by Macri (Macri Ex. 67) for amounts claimed collected by Schaefer and due the United States (R. 40-46), despite such district court's finding of fact No. 20 (R. 105) that such levy and claim had been made and despite such district court's conclusion of law No. 7 (R. 111), and such court's oral pronouncement that such protection would be given (R. 2227).

12. In affirming any judgment for Schaefer against Macri because the same is against the controlling law of the State of Washington in that the relationship between Macri and Schaefer was contractually based on a written contract and subcontract (Pltf. Exs. 1, 3, 5), which contract and subcontract were both fully performed and were not in any manner abrogated, superseded or rendered nugatory (R. 138-139).

13. In affirming (R. 2268) the district court's oral pronouncement (R. 2222) that Macri is liable for any of Schaefer's claimed overhead costs, specifically as not supported by the Court of Appeals citation (R. 2268) to the Washington case of *Nelson v. City of Seattle*, 180 Wash. 1, 28, 38 P.(2d) 1034, as contrary to the controlling law of the State of Washington, or for Schaefer's claimed loss of profits, on a *quantum meruit* basis or any other basis without complete proof thereof, which was not made by Schaefer.

14. In affirming the district court's failure and

refusal to determine that any sum other than $34,-974.03 gross earnings, as represented by 13,697 cubic yards of concrete placed at $26 per cubic yard as the subcontract price (Pltf. Ex. 5), less all payments thereon by Macri to and accepted by Schaefer of $32,-614.66, is the only amount payable to Schaefer by Macri, subject, however, to such unpaid balance being first freed by Schaefer from U. S. Treasury Department notice of levy (R. 40-46, Macri Ex. 67).

15. In stating in its opinion (R. 2269) that "The Macris rely upon *City and County of San Francisco v. Transbay Construction Co.*, 134 F.(2d) 468 (Cir. 9) * * * (etc. pertaining thereto) * * * ," because such case was not cited or relied upon by Macri or by any other party litigant, either in the briefs or upon oral argument, but instead was injected into oral argument before such Court of Appeals by inquiry of Judge Healy and by direction of Chief Judge Denman that such case be read and that such court be written about such case.

ARGUMENT

Summary of Argument.

1. Only remedies for partial breach of subcontract can apply.

2. Recovery on either implied or *quasi* contract is precluded.

3. Rescission and recovery are not allowed where there is either full or substantial subcontract performance.

4. Recovery on *quasi* contract precluded where there is no segregation of costs from the cost of work done under the subcontract; Schaefer's proof is insufficient for recovery.

5. Subcontract price is the limit of Schaefer's recovery because of his failure to comply with subcontract terms respecting extra compensation for any delayed performance.

6. Schaefer's failure to minimize damage prevents recovery.

7. Schaefer's failure to comply with Secs. 9976-9980, Rem. Rev. Stat. of Washington, precludes his recovery.

8. Court of Appeals' unwarranted use of its own former opinion with disregard of applicable decisions of the Supreme Court of the United States vitiates its judgment.

9. Court of Appeals' disregard of double liability by judgment entered and without protection against asserted federal tax lien therein is confiscatory and reversible.

1. Only Remedies for Partial Breach of Subcontract Can Apply, Precluding (2) Recovery on Either Implied or *Quasi* Contract, Because (3) Rescission and Recovery Are Not Allowed Where There Is Either Full or Substantial Subcontract Performance.

Schaefer did not elect to abandon and rescind his subcontract. Instead, he completely performed it (R. 523). He currently accepted and cashed the monthly estimate checks (*e.g.*, Macri Exs. 99, 127, 128). Likewise, he ordered payments to his creditors by Macri from his subcontract earnings. Similarly, he invoked, but did not follow through, an arbitration provision of his subcontract (Pltf. Ex. 5, Art. 3, Sec. 9, Macri Ex. 124). *Schaefer did not perform any other contract items than those called for by his subcontract.* Instead, he refused so to do. The district court stated with respect thereto (R. 2214): "* * * He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. * * * And I think his conduct isn't consistent with the meeting of the minds of an express contract that Mr. Macri was to pay for the fair value of his services * * *."

The Court of Appeals' opinion states that "The Washington substantive law of contracts is applicable" (R. 2267), by reason of the underlying doctrine of *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 82 L.ed. 1188, applying 28 U.S.C.A. 725. Fiat to such effect was given the Court of Appeals, Ninth Circuit, through reversal of its opinion, in the case of *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180, 187-8, 85 L.ed. 114, 117-118, for failure of such Court of Appeals to follow the holding

of the Supreme Court of California. That case cited *West v. American Teleph. & Teleg. Co.*, 311 U.S. 233, 237, 85 L. ed. 139, 144, and the former case from the Ninth Circuit of *Tipton v. Atchison T. & S. R. Co.*, 298 U.S. 141, 151, 80 L.ed. 1091, 1097, where that Court of Appeals was sustained for following a state court pronouncement. *Semble, Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 89 L.ed. 101, 103; *King v. Order of United Com. Trav of America*, 333 U.S. 152, 157, 92 L.ed. 601, 611.

The Court of Appeals' opinion in the present case has disregarded the controlling Washington law with a citation to three Washington cases only (R. 2268-9), none of which is applicable as controlling on fundamental merits, as hereinafter discussed. It has disregarded the following positive declarations of the Supreme Court of the State of Washington governing the substantive law of contracts in such State.

(1. *Only remedies for partial breach of subcontract can apply.*) *Chandler v. Wash. Toll Bridge Authority*, 17 Wn. (2d) 596, 604, 137 P.(2d) 97, 103:

> "A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract. 71 C.J. 81, Sec. 42; 17 C.J.S., p. 321; *Schneider v. Allis-Chalmers Mfg. Co.*, 196 Wis. 56, 219 N.W. 370; *Federal Royalty Co. v. Knox*, 114 F.(2d) 78."

Semble: *Fry v. Granger's Warehouse Co.*, 131 Wash. 497, 500, 230 Pac. 423, 424; *Bankers Trust Co. v. Am. Surety Co.*, 112 Wash. 172, 178, 191 Pac. 845, 848; *Mallory v. Olympia*, 83 Wash. 499, 503, 145 Pac.

627, 629; *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 12, 188 Pac. 792, 796; *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 145, 154 Pac. 123, 125.

(2. *Recovery on either implied or quasi contract is precluded.*) *Nelson v. Seattle*, 180 Wash. 1, 9, 38 P.(2d) 1034, 1037, states:

> "* * * Of course, recovery on *quantum meruit* is permissible only where the work done is not provided for in the contract. *Strong & MacDonald v. King County*, 147 Wash. 678, 267 Pac. 436. Since the contract provides for the removal of such material, Nelson cannot recover any additional amount on *quantum meruit*."

Semble: *McBride v. Callahan*, 173 Wash. 609, 628, 24 P.(2d) 105, 112.

(3. *Rescission and recovery are not allowed where there is either full or substantial subcontract performance.*) *Rozzano v. Moore*, 175 Wash. 566, 571, 27 P.(2d) 1096, 1098, states:

> "It is not every breach of a contract that entitles the other party thereto to rescind. The breach must be substantial, and, as stated in 6 R.C.L. 926, 'the act failed to be performed must go to the root of the contract.' The text of 13 C.J. 613 is to the same effect. Rescission is to be enforced in equity, and must, under all the circumstances of the particular case, be a just and equitable remedy. The cases of *Distler v. Dabney*, 7 Wash. 431, 35 Pac. 138, 1119; *Thacker Wood & Manufacturing Co. v. Mallory*, 27 Wash. 670, 68 Pac. 199; *Skoog v. Columbia Canal Co.*, 63 Wash. 115, 114 Pac. 1034, and *Main v. Western Loan & Building Co.*, 167 Wash. 1, 8 P.(2d) 281, conform to this doctrine."

Semble: *Marrazzo v. Orino*, 195 Wash. 364, 378, 78 P.(2d) 181, 187; and *Wray v. Young*, 122 Wash, 330, 334, 210 Pac. 794, 796; (see also 12 Am. Jur. Contracts, Sec. 390, Appendix I).

Notwithstanding the foregoing, the Court of Appeals (in the present case, R. 2268) cites *Olwell v. Nye & Nisson Co.*, 26 Wn.(2d) 282, for its authority that Schaefer should recover "in excess of the stipulated contract price for extra work performed in reliance on Macri's statements, which were intended to induce reliance." That *Olwell* case, however, at 26 Wn.(2d) 282, 286-7, holds only that where there was a *quasi* contract (*as distinguished from the existing express subcontract fully performed by Schaefer*), the promisee may waive the tort of the breach and bring an action *in assumpsit* for restitution of resulting losses. Schaefer, differently from Olwell, accepted $32,614.66 of the total contract price of $34,974.03, with the $2,359.37 unpaid balance distrained in Macri's hands by the U. S. Treasury levy for Schaefer's indebtedness to the government, and fully performed the subcontract (R. 78, 104, 124, 105; Macri Ex. 67, R. 40-46).

The Court of Appeals then states (R. 2268) "* * * the measure of Schaefer's recovery against Macris should be the reasonable value of the work plus overhead and profit." It cites the aforesaid *Nelson* case, at page 28 of 180 Wash. 38 P.(2d) 1034, *which does not* at the cited place or elsewhere specify or provide for "overhead" but only for "operating cost per day" and the "going rate on city contracts" of 15% for profit. That was allowed in the

Nelson case only for the time that the subcontractor's performance was extended by Nelson's delay (180 Wash. p. 23), not in lieu of the time within the contract terms. And costs per day for such additional time of delay were proven (180 Wash. p. 28). That was not substituting for the contract performance rate, but was allowing additional compensation for delayed performance. Even that determination of extra compensation for delay has to be read with our above quotation from page 9 of such 180 Wash. case, and our later quotation herein from page 15 of such case. The Court of Appeals' citation, therefore, does not speak the law of Washington by its said citation at page 28 of such 180 Wash. case.

The Washington State decisions above quoted and cited are consistent with the Restatement of the Law of Contracts, Sec. 313, Subdiv. (1) and (2), Sec. 317 thereof, Subdiv. (1), read with Sec. 275(a) and Subdiv. (2) and (7) thereof. See also 12 Am. Jur., Contracts, Sec. 389. There is no judicial departure in the State of Washington from such rules set forth in Restatement of the Law of Contracts. Also, the Washington State holdings above quoted and cited are consistent with holdings of the Supreme Court of the United States in *Klebe v. U.S.*, 263 U.S. 188, 68 L. ed. 244; *Hawkins v. U. S.* (C.C.A. 6) 96 U.S. (6 Otto) 689, 24 L. ed. 607; *Hubbard v. New York Inv. Co.*, 119 U.S. 696, 30 L. ed. 548; *Ingle v. Jones*, 2 Wall. (69 U.S.) 1, 17, 17 L. ed. 762, 764; and see also *Frazier-Davis Const. Co. v. U. S.*, 100 Court Claims 120.

It is stated in *Hawkins v. U. S.* (1887) 96 U.S. 689, 698, 24 L. ed. 607, at 610:

> "Hence the rule is, that, if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit*."

The above statement is quoted in 2 Fed. Law of Contracts, Sec. 496, page 315. See also cases therein cited. 2. Fed. Law of Contracts, Sec. 487 states:

> "It is familiar principle of law, that, where circumstances occur which authorize a party to rescind a contract, he must elect whether he will rescind or whether he will pursue his remedies under the contract; he cannot do both; and a party may by continuing to treat the contract as in force waive a prior cause for rescission. Thus the right of a party, who contracted to dress stone to be delivered to him by the other party, to rescind because of a delay in the delivery of the stone is waived where he received and dressed a large part of the stone after shipments to him had been resumed."

The quotation above referred to the case of *Graham v. U. S.* (C.C.A. 4) 188 Fed. 651. See also 2 Fed. Law of Contracts, Sec. 492. It is for this reason that the case of *U. S. v. Zara Cont. Co.*, 146 F.(2d) 606 (cited by Court of Appeals, R. 2268) is not in point, for that case, insofar as recovery in *quantum meruit* is concerned, involved a total breach of the contract and the court held (at pp. 609-610) that the plaintiff's claim for extra compensation in addition to the contract was precluded if he had been forced to rely upon the contract.

Similarly, *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 266, 70 L. ed. 938, 940, supports the substantive law of contracts of the State of Washington. The Washington cases above quoted and cited are so entirely in harmony with such *Wyckoff* case that Macri relied principally upon it in appeal to the Court of Appeals. Yet, such court entirely disregarded the *Wyckoff* case. Its holding, entirely harmonious with the Washington State decisions is found at Appendix 3 herein.

4. Recovery on *Quasi* Contract Precluded Where There Is No Segregation of Costs From the Cost of Work Done Under the Subcontract; Schaefer's Proof Is Insufficient for Recovery.

Schaefer made no segregation of any claimed extra costs from the costs otherwise current in performance of the subcontract, *which Schaefer completely performed.* The Washington Supreme Court has declared that there must be such a segregation. It is well stated in the aforesaid case of *Nelson v. Seattle*, 180 Wash. 1, at p. 15, 38 P.(2d) 1034, 1039, where, in discussing the claim of a subcontractor, one Moceri, it is stated:

> "Here, again, we turn to Moceri's own conduct and his methods in handling the work and his accounts. It will be remembered that Moceri's contract called for the laying of sewers and water mains. After Nevada finished with the excavations and subgrading, Moceri went in and dug trenches for the sewers and water mains. After the mains and sewers were laid, there were large quantities of earth that had come from

the trenches which could not be backfilled. It was, of course, necessary for him to remove such surplus earth from the streets, in order to lay pavements. It is while removing such surplus earth from the trenches that he claims he did the subgrading for which he now makes claim. Yet he made no attempt to segregate costs, time of men, or time of equipment, put in on the subgrading, from the costs and time of men and equipment put in on fine grading and the removal of trench earth. Furthermore, in his Federal income tax report, he included all such costs as a part of expense of operation under his contract with Nelson. And on top of it all, he never, during the progress of the work (except in an instance when he was paid extra), made to the city, Nelson, or Nevada, any protest as to the condition in which the subgrade was left by Nevada. * * *"

Semble: *Ross v. Raymer*, 132 Wash. Dec. 131, 140, 201 P.(2d) 129, 135; *Blakiston v. Osgood Panel & Veneer Co.*, 173 Wash. 435, 440, 23 P.(2d) 397, 399; *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 249, 182 P.(2d) 75, 81; *Automatic Canteen Company of Washington v. Automatic Canteen Company of America*, 182 Wash. 133, 140, 45 P.(2d) 41, 44; *Hole v. Unity Petroleum Corp.*, 15 Wn.(2d) 416, 424, 131 P.(2d) 150, 153; *Lloyd v. American Can Co.*, 128 Wash. 298, 313, 222 Pac. 876, 881; *Bromley v. Heffernan Engine Works*, 108 Wash. 31, 32, 182 Pac. 929, 930; and *Strong & MacDonald v. King Co.*, 147 Wash. 678, 685, 267 Pac. 436, 439.

Also, Schaefer having currently throughout his subcontract performance accepted payments on pro-

gress and final estimates (*e.g.*, Macri Ex. 99, 127, 128, Item 12; Pltf. Ex. 14) is legally presumed to have accepted such payments for full performance of all services (except for the sum of $2,359.37, balance withheld by levy of the U. S. Treasury Department). This is well stated in *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 249, 182 P.(2d) 75, 81:

> "A reading of the cases hereinbefore cited will show that, under the rules announced by this court, the degree of proof required to establish a claim for services under an original contract, be it express or implied, is no different from that necessary to establish a claim for additional and different services. However, in the latter case, where the one performing the service accepts the payments agreed to under the original contract, there is a presumption that he accepts them in full payment for all services. In both cases mentioned, the proof must be of the clearest and most convincing character."

Schaefer's proof is not of the "clearest and most convincing character," as called for by such *Ammerman*, 28 Wn.(2d) case, just quoted from. In fact, there was admittedly no evidence segregating the cost of any additional work. Schaefer furnished no statement for any claimed extras, regardless of whether or not they were ordered by Macri (R. 341, 1452, 1471, 2155). The subcontract itself provided that such statements must be furnished as a prerequisite to payment (Pltf. Ex. 5, Art. 3, Sec. 3).

Schaefer's evidence as to amount of damages, tried by any of the substantive law of contracts of the

State of Washington, was, therefore, speculative and based on insufficient evidence, too uncertain for him to recover herein. *Automatic Canteen Company of Washington v. Automatic Canteen Company of America*, 182 Wash. 133, 141, 45 P.(2d) 41, 44; *Quigg Construction Co. v. Chelan County*, 108 Wash. 314, 317, 184 Pac. 331, 332 (quoting from *Hawkins v. U. S.*, 96 U.S. 689, 29 L. ed. 607). This is also the holding of this Supreme Court of the United States and of federal courts of appeal. *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156, 164, 67 L. ed. 183, 188; *Jack v. Armour & Co.* (C.C.A. 8) 291 Fed. 741, 745.

The district court's judgment amount was based on Schaefer's proffered proof, Pltf. Ex. 63 (an accountant's tabulation instead of original books and records, permeated with the accountant's own ideas as to overhead and profit). The judgment was at least 7½ times the contract price of the related units and at least $25,000 more than the amount for which Schaefer estimated he could do the work by hand. The judgment, therefore, is both speculative and based on conjecture. *Locker v. American Tobacco Co.* (C.C.A. 2) 218 Fed. 447, 450.

The district court's allowance of recovery of more than the subcontract price *when Schaefer had fully performed the subcontract and had taken all estimated payments*, and the Court of Appeals' affirmation thereof, are pointedly in conflict with decisions of at least three other federal courts of appeal: *Farnum v. Kennebec Water Dist.* (C.C.A. 1) 170 Fed. 173, 178 (where the plaintiff contractor was even ejected wrongfully from the contracted

work); *Wolfe v. Prairie Oil & Gas. Co.* (C.C.A. 10) 83 F.(2d) 434, 438 (where contract fully performed, "the contract will limit the amount of recovery"); *United States Potash Co. v. McNutt* (C.C.A. 10) 70 F.(2d) 126, 129-130, 131; and *Foss-Schneider Brewing Co. v. Bullock* (C.C.A. 6) 59 Fed. 83, 90.

Semble: (Supreme Court of U. S.) *Roehm v. Horst*, 170 U.S. 1, 8, 44 L. ed. 953, 956 (Schaefer required either to repudiate subcontract or perform; if performed, subcontract price controls); *U. S. v. Smoot*, 15 Wall. 36, 21 L. ed. 107, 110 (must be impossibility of performance to substitute for contract price of recovery); *Dingley v. Oler*, 117 U.S. 490, 503, 29 L. ed. 984, 988 (must be repudiation by subcontractor, not performance thereof, to recover differently than for contract price).

5. Subcontract Price Is the Limit of Schaefer's Recovery Because of His Failure to Comply With Subcontract Terms Respecting Extra Compensation for Any Delayed Performance.

The Schaefer subcontract (Pltf. Ex. 5, par. 5) specifically provides for delay, neglect or default of Macri, in the following wording:

> "If the work hereunder shall be delayed by any act, neglect or default of the Owner or of the Principal Contractor upon the entire work, * * * the Subcontractor shall give the Principal Contractor notice in writing within five days after the occurrence of any such act, omission or event, specifying the fact and cause of delay."

Schaefer did not give any such written notice (R. 1452, 1589-90, 1595). Nothing but oral complaints

were ever attributed by the district court in Schaefer's favor. "He continued to complain" (R. 2214). The Court of Appeals (R. 2269) and the district court (R. 109) converted this complaining by Schaefer into holding that Macri accepted and acted on oral instead of written notices, as required by the subcontract. The Court of Appeals cites *Ritchie v. State*, 39 Wash. 95, 81 Pac. 79, as the third Washington case deemed by it as directing judgment for Schaefer, notwithstanding the above quoted subcontract provision as to delays. That *Ritchie* case context is actually at page 100 of 39 Wash. and is dictum. The court had already decided the case at page 99 on the ground that the state's employment of an architect could be oral despite legislative act requiring certain building construction contracts to be in writing. Dictum in state decisions do not control federal court decisions. *Bank of California v. American Fruit Growers*, 41 F. Supp. 967, 975.

The substantive law of contracts in the State of Washington is contrary to the Court of Appeals' conclusion. A direct Washington decision in 1905 on the legal effect of a "delay clause" is found in *Goss v. Northern Pac. Hosp. Ass'n.*, 50 Wash. 236, 238-9, 96 Pac. 1078, 1079, Appendix 2. The much more recent Washington case (1942) of *Ericksen v. Edmonds School Dist.* 13 Wn.(2d) 398, 409-410, 125 P. (2d) 275, 280, reaffirms the *Goss* case. It cites controlling cases of the Supreme Court of the United States in support of the following proposition:

> "Where, however, the contract expressly precludes the recovery of damages by the contractor

for delay caused by the default of the owner, that provision will be given full effect. *Wells Brothers Co. v. United States*, 254 U.S. 83, 65 L. ed. 148, 41 S. Ct. 34; *Wood v. United States*, 258 U.S. 120, 66 L. ed. 495, 42 S. Ct. 209; *Orlando v. Murphy* (C.C.A. 5) 84 F.(2d) 531, writ of certiorari denied, 299 U.S. 580, 81 L. ed. 427, 57 S. Ct. 45; *Merchants' Loan & Trust Co. v. United States*, 40 Ct. Cl. 117; *Poole Engineering & Machine Co. v. United States*, 57 Ct. Cl. 232, 63 Ct. Cl. 234; *John N. Knauff Co., Inc. v. United States*, 78 Ct. Cl. 423; * * *." (And many cases from sundry state courts of last resort)

"The specific provision here in question states positively that the contractor shall not be entitled to any claim for damages on account of hindrances or delays *from any cause whatsoever.* This statement is then given further emphasis, in the contract by a stipulation that, if such hindrances or delays are occasioned by any act or omission on the part of the owner himself, additional time for the completion of the work will be allowed, provided always that the contractor shall have given notice in writing of the cause of the hindrance or delay alleged to be the result of the owner's conduct. Appellant, in this instance, did not give the notice entitling him even to an extension of time. But wholly aside from his failure in that respect, he was in any event precluded by the express terms of his contract from maintaining an action for damages resulting from hindrances and delays.

"The law in this state upon the subject under consideration was definitely established many years ago in the case of *Goss v. Northern Pacific Hospital Ass'n.*, 50 Wash. 236, 96 Pac. 1078. * * *"

6. Schaefer's Failure to Minimize His Damage Prevents Recovery.

Even breach by Macri of Schaefer's subcontract as found by the district court (R. 102) and affirmed by the Court of Appeals (R. 2268), though not conceded by Macri, still imposes on Schaefer the duty to minimize damages under Washington State substantive law of contracts. This Schaefer did not do.

As stated in the foregoing Macri petition, if Schaefer had performed all bid items for all of the principal contract items related to his subcontract performance bid items, it would have cost less than 1/7th of the amount of his judgment. By such an expenditure, for which he would have been paid under his subcontract (Ptlf. Ex. 5), and the principal contract (Pltf. Ex. 1, 3), Schaefer could have completely escaped damage. On the basis of his own cost estimate (R. 2122) he could have done all excavations by hand and still saved $25,000 in his asserted cost of performance. The district court specifically declared that "he specifically refused to take over the fine grading and excavating when Mr. Macri * * * offered to turn it over to him" (R. 2214). Schaefer's failure to minimize damages under the Washington decisions precludes recovery.

Peninsular Sav. & Loan Ass'n. v. Breier Co., 137 Wash. 614, 647, 243 Pac. 830, 832, states:

> "It is the duty of every person, who suffers a wrong at the hands of another, to make a reasonable effort to mitigate his damages; and in this instance it was the duty of the respondent, after it learned that the appellant would not carry out the contract of lease, to make a reason-

able effort to put the premises to some other beneficial use.* * *"

Semble: *Arkley Lumber Co. v. Vincent*, 121 Wash. 512, 515, 209 Pac. 690, 691; *Poston v. Western Dairy Products Co.*, 179 Wash. 73, 86, 36 P.(2d) 65, 70; *Hoff v. Lester*, 25 Wn.(2d) 86, 95, 168 P.(2d) 409, 414.

Cannon v. Oregon Moline Plow Co., 115 Wash. 273, 278-9, 197 Pac. 39, 41, states:

"There is another principle which applies also respecting the recovery of such special damages, and that is, that the complaining party must have done everything in his power to make the damages as little as possible. * * *"

7. Schaefer's Failure to Comply With Secs. 9976-9980, Rem. Rev. Stat. of Washington, Precludes His Recovery.

Secs. 9976-9980, Rem. Rev. Stat. of Washington, prescribe the method under which a person legally may operate and sue in the State of Washington under an assumed trade name. Schaefer entered the subcontract (Pltf. Ex. 5), performed all work thereunder and brought this suit as use plaintiff all under the assumed trade name of Concrete Construction Co.

Sec. 9980, Rem. Rev. Stat. of Washington, pertaining to suit, provides:

"No person or persons carrying on, conducting or transacting business as aforesaid, or having an interest therein, shall hereafter be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as pro-

vided for in section 9976, and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit."

Schaefer's right to prosecute the action because of failure to comply therewith was challenged by Macri at trial as legally unwarranted (R. 140, 179, 180, 670-673). The district court sustained Schaefer and entered its conclusion of law No. 8 accordingly (R. 111). The Court of Appeals affirmed by disregarding (R. 2264-2273) this error asserted by Macri (R. 140, 2264). The Supreme Court of the United States has declared that a statutory provision which would bar action in a state court will bar such an action in a federal court. In *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 89 L. ed. 2079, 2087, the court states:

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. * * *."

In discussing the Rules of Decisions Act (28 U.S. C.A., Sec. 725; 8 F.C.A., Title 28, Sec. 725), the Supreme Court in *King v. Order of United Com. Travelers*, 333 U.S. 153, 157, 92 L. ed. 608, 611, states:

> "The ideal aimed at by the Act is, of course, uniformity of decision within each state. So long as it does not impinge on federal interests, a state may shape its own law in any direction it sees fit, and it is inadmissible that cases dependent on that law should be decided differently according to whether they are before federal or state courts. This is particularly true where accidental factors such as diversity of citizenship and the amount in controversy enable one

of the parties to choose whether the case is tried in a federal or a state court."

Semble: (in federal district courts), *Mayflower Stockholders Protective Committee v. Mayflower Hotel Corp.* (D.C.D.C., 1947) 73 F. Supp. 721; *Eagle Star Insurance Co. v. Bean* (D.C., E.D.W.) 134 F.(2d) 755, 757.

The Supreme Court of Washington has declared that failure to comply with Secs. 9976-9980, Rem. Rev. Stat. of Washington, is a bar to suit. *Sussman v. Mentzer*, 193 Wash. 517, 522, 76 P.(2d) 595, 597, states:

> "* * * Section 9980 (P.C. Sec. 4360), provides that no person conducting business under an assumed name shall be entitled to maintain a suit in any court of this state without alleging or proving that the certificate required by the act has been filed. Certainly, the certificate offered and received in evidence is not in accord with the allegations of paragraph one of appellant's complaint."

8. Court of Appeals' Unwarranted Use of Its Own Former Opinion With Disregard of Applicable Decisions of the Supreme Court of the United States Vitiates Its Judgment.

The Court of Appeals' opinion (R. 2269) states:

> "The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d 468 (Cir. 9). * * *"

A major portion of its opinion is then devoted to distinguishing that case from the present one (R. 2269-70). The above quoted statement is in error, which cannot be shown to the Supreme Court without refer-

ence to the briefs filed before argument in the Court of Appeals, and they are not part of the record available to petitioners Macri to be certified at their instance from such court. We can, therefore, only produce in the appendix in this brief an exact quotation from pages 4 and 5 of Macri's printed petition for rehearing (Appendix 4). We do respectfully request this Supreme Court to regard the same notwithstanding the limit in its rules as to record to be certified to it, because it contains an exact statement of what did occur.

In that connection it is to be noted that Continental, in its brief in support of its present petition for writ of certiorari, at p. 39, quotes from such *City and County of San Francisco* case. This is the first time it has appeared in any brief in this action. That quoted portion of such case is a part which the Court of Appeals did not discuss in the present opinion.

The applicable opinion to control against Schaefer, and the one consistently relied on by Macri, is *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 70 L. ed. 938, (Appendix 3). It has abundant support: *U. S. v. Blair*, 321 U.S. 730, 88 L. ed. 1039, 1043; *U. S. v. Callahan Walker Construction Co.*, 317 U.S. 56, 61, 87 L. ed. 49 53. The Court of Appeals has disregarded these and many other supporting opinions of the Supreme Court of the United States. It has thereby decided a federal question, contrary to its own former decision confirmed by *Tipton v. Atchison T. & S. R. Co.*, 298 U.S. 141, 151, 80 L. ed. 1091, 1097, and has thereby now decided a federal question also, in a way which is in conflict with the applicable decisions of the Supreme Court of the United States.

9. Court of Appeals' Disregard of Double Liability by Judgment Entered and Without Protection Against Asserted Federal Tax Lien Therein, Is Confiscatory and Reversible.

It goes, almost without saying, that where the district court declared that protection would be given against the federal tax lien for Schaefer's indebtedness to the government, and provided in its finding and conclusion of law with respect thereto (set forth in Assignment of Error No. 11 above), and where the Court of Appeals affirms the same without change, that Macri is placed in jeopardy by the terms of the very levy itself (R. 40-46). It is equally confiscatory of Macri's property interests as a party litigant for the Court of Appeals to allow the judgment as entered by the district court to remain unaltered, where it provides not only for a $56,764.97 judgment in favor of Schaefer, but an unconditional judgment for $56,764.97 additional in favor of Continental, and this despite the fact that Continental in its reply brief disavowed to the Court of Appeals any claim by it to an unconditional judgment (Assignment of Error No. 7).

CONCLUSION

It is respectfully submitted that the Court of Appeals, Ninth Circuit, has turned its back on the pronouncements to it in 1940 by the decision of the Supreme Court of the United States in *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180, 187-8, 85 L. ed. 114-118, and in 1936 in *Tipton v. Atchison T. & S. R. Co.*, 298 U.S. 141, 151, 80 L. ed. 1091, 1097. The opinion and judgment are

contrary to other similar federal pronouncements we have cited. They are also contrary to the substantive law of contracts as declared by the Supreme Court of the State of Washington.

In connection therewith, it is here further respectfully submitted that the only "labor and material in the prosecution of the work provided in such contract" (as dictated by the very wording of U.S.C.A. Title 40, Sec. 270b, 49 Stat. 793, 794) and the only "balance *thereof* unpaid" (id.) is the $2,359.37 balance of subcontract price, which stands distrained in Macri's hands by U. S. Treasury Department, Internal Revenue Service, notice of levy of tax lien against Schaefer (R. 105, ff.20). Except for this balance there could be no possible jurisdiction for this action.

In conclusion, it is therefore respectfully submitted that this case calls for exercise by the Supreme Court of the United States of its supervisory powers, that writ of certiorari should be granted as prayed, and that thereafter the opinion and judgments of the Court of Appeals, Ninth Circuit, should be reviewed, reversed and the recovery limited to aforesaid $2,359.37 when, and only when, freed from the federal asserted tax lien.

Respectfully submitted,

TOM W. HOLMAN
S. W. BRETHORST
Attorneys of Record in this court for Petitioners Sam Macri, Don Macri and Joe Macri, individuals and co-partners.

APPENDIX

1. 12 Am. Jur., Contracts, Sec. 390, states as follows:

> "Waiver of Total Breach; Election to Continue Performance.—The right to refuse to perform further or to accept further performance and to maintain immediately an action for damages because of a material or total breach may be waived, and the injured party may accept or insist on performance after such breach of the contract. Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed depriving him of a right of action for the breach which has already atken place, but depriving hi mof any excuse for ceasing performance on his own part. *And under ordinary circumstances, where there is an existing actual breach of contract, of a character going to the essence, the innocent party will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to performance.*" (Italicized portion added to section by pocket supplement)

— — — — — —

2. *Goss v. Northern Pac. Hospital Ass'n.*, 50 Wash. 236, 238, 96 Pac. 1078, 1079:

> "The trial judge ruled as he did on the principal question because of the clause in the con-

tract above quoted. He held that since the parties had contracted that for any delay caused the appellant by the 'act, neglect, delay or default . . . of any other contractor,' additional time should be given him for the completion of the work, that this marked the extent of appellant's remedy for such act or default.

"It seems to us that this conclusion is sound. For conditions which arise in the execution of a contract and for which the contract itself makes no provision, the courts are at liberty to apply the ordinary legal remedies when these conditions become a subject of controversy between the contractors; but where the probability of the happening of the condition has been foreseen and a remedy is provided for its happening, the presumption is that the parties intended the prescribed remedy as the sole remedy for the condition, and this presumption is controlling where there is nothing in the contract itself or in the conditions surrounding its execution that necessitates a different conclusion. So in this case, since the parties foresaw that the appellant might be delayed in the execution of his part of the work by the failure of the party having the contract for the plumbing and heating plant to perform its work on time, and provided in the contract that the remedy therefor should be an extension of time on his part to perform the work, the presumption arises that this was intended to measure the rights of the contractor thereunder. Is there anything in the contract itself, or in the circumstances surrounding it, that precludes the idea that it was so intended? We see nothing that works against the conclusiveness of the presumption. The contract was an ordinary building contract, in which the parties undertook

to put in writing all of their rights and liabilities thereunder. It provided for every condition that could arise in its execution, leaving nothing to surmise or inference, and we think it must be held to contain the entire agreement.

"This question was passed upon in the case *Haydnville Min. & Mfg. Co. v. Art Institute*, 39 Fed. 484, where the rule was announced in accordance with the conclusion we have reached, and in the cases of *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333, and *Genovese v. Third Ave. R. Co.*, 13 App. Div. 412, 43 N.Y. Supp. 8, where a contrary conclusion was announced. For the reason stated, however, we feel constrained to follow the doctrine of the Federal case."

3. *United States v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 266, 70 L. ed. 938, 940:

"The government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay (*United States v. Smith*, 94 U.S. 214, 24 L. ed. 115; *United States v. Mueller*, 113 U.S. 153, 28 L. ed. 946, 5 Sup. Ct. Rep. 380; *Ripley v. United States*, 223 U.S. 695, 56 L. ed. 614, 32 Sup. Ct. 352); that the increase in the market value of materials purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon *quantum meruit*. The contention is, in our opinion, well founded.

"The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the government's delay. After completing performance it brought this suit declaring on the original contract.

"The contractor urges also that, because of the delay, it might have used the supplies purchased on another job, receiving on that their then market value, or might have sold them and taken the incidental profit due to the rise in values; and that, if it had done either and had been obliged later to purchase new supplies at the higher market values in order to perform the government job, the increased cost would have been recoverable as a loss; and that, as the amount of this increase has been found, the recovery should be sustained at least to that extent. The contractor's contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. The contractor elected to hold itself in readiness to perform its contract and to this end to retain both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. It may even be that in the event of a use or resale of the supplies, if under the circumstances such a course of action was open to the contractor, the profits made would have been available in reduction of damages. Compare *Erie*

County Natural Gas & Fuel Co. v. Carroll (1911) A.C. 105—P.C. But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job.

"It is argued that the court of claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at its results; that itemization is often impossible; and that, like a jury, the court may make an estimate and return such sum as the damages recoverable (compare *United States v. Smith*, 94 U.S. 214, 219, 24 L. ed. 115, 116), and that, accepting the rule that damages are to be limited to actual loss, the award of the lower court is to be regarded as an estimate of such loss. But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely the increase in value of the work at the time it was performed and the increase in value of the material during the period of the delay. Then it found and concluded, as a matter of law, that the excess of the reasonable value of the work at the time it was done over the amount paid therefor, was recoverable as damages. This was error."

4. Reproduction from Macri petition for rehearing, p. 4:

"It is respectfully submitted that between time of argument before this court on October 19, 1948, and time of filing opinion, February 11, 1949, the Honorable Judges of this court have been unintentionally drawn away from the issues as they were presented. The following statement from the filed opinion shows a decided warping:

" 'The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. (2d) 468 (Cir. 9). * * *'."

The fact is that His Honor Judge Healy, near the end of concluding argument by Mr. Holman, for the Macris, asked, in substance, what is to be said about the applicability of the above-mentioned case; that Mr. Holman stated frankly he was unfamiliar with that case, and that none of the parties litigant had cited it in their briefs or in argument to the court; that thereupon His Honor Judge Denman suggested that Mr. Holman read that case and write the court after doing so. That not only was done by Mr. Holman, but all parties litigant wrote the court specifically about that case.

> "It is, therefore, manifestly unfair to have the filed opinion so state the Macris' position. That statement is not supported by the briefs or by oral argument. In fact, our position is definitely based on *United States v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 46 Sup. Ct. 503, 70 L. ed. 938, as cited and discussed in the Macris' opening brief, pp. 49-51, 52, App. III, reply brief pp. 5, 12. The court, notwithstanding this, has not even mentioned that prime case, nor has the court cited and discussed any Washington authorities contrary to the holding of the above *Wyckoff* case."

No. 135

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In the

Supreme Court of the United States

OCTOBER TERM, 1949

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vs.

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A. J. GOERIG and CLYDE PHILP, individuals and copartners, *Defendants*,

CONTINENTAL CASUALTY COMPANY, a corporation, *Additional Petitioner*.

REPLY TO BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

TOM W. HOLMAN
S. W. BRETHORST
Attorneys for Petitioners
Sam Macri, Don Macri and Joe Macri
1710 Hoge Building,
Seattle 4, Washington.

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S. W. BRETHORST
Attorneys for Petitioners
Sam Macri, Don Macri and Joe Macri
1710 Hoge Building,
Seattle 4, Washington.

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In the

Supreme Court of the United States

OCTOBER TERM, 1949

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners, *Petitioners*,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY, *Respondent*,

A. J. GOERIG and CLYDE PHILP, individuals and copartners, *Defendants*,

CONTINENTAL CASUALTY COMPANY, a corporation, *Additional Petitioner*.

No. 135

REPLY TO BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

This reply to respondent's brief is respectfully submitted as directed only to those salient points basically determinative for issuance of a writ of certiorari as prayed, prefaced by the following citations.

Since filing our petition herein the Supreme Court of the United States, on June 20, 1949, decided the following three cases, in each of which the provisions of state statutory enactments controlled. In *Cohen v. Beneficial Industrial Loan Corp.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1224, 69 S. Ct. 1221, the judgment of the court of appeals (3rd Cir.) was affirmed so as to require for the benefit of a non-resident corporation

security for costs in a stockholders' derivative suit against it in a federal court in New Jersey, as prescribed by the laws of New Jersey for such type of suit. In *Woods v. Interstate Realty Co.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1245, 69 S. Ct. 1235, the judgment of the court of appeals (5th Cir.) was reversed to deny a non-resident corporation right to sue in a federal district court in Mississippi because such corporation had failed to qualify for doing business in that state as required by the laws thereof. In *Ragan v. Merchants Transfer & Warehouse Co.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1248, 69 S. Ct. 1233, the judgment of the court of appeals (10th Cir.) was affirmed to grant summary judgment in a tort action started by filing complaint in a federal district court in Kansas and conducted agreeable to Federal Rules of Civil Procedure, within, but without having service made within, the two-year period required for suit by the laws of Kansas.

For the basic case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. ed. 1188, it is clear that its application includes substantive rights, but difficulty exists in distinguishing to a nicety and in categorizing substantive and procedural rights arising under statutes or decisions. The premise of the *Erie R. Co. v. Tompkins* case is that both resident and non-resident suitors in federal courts shall be on equal basis, without handicap from a state's laws or decisions to either a resident or a non-resident of such state. Tersely put, if a state resident cannot do a certain thing, a non-resident also cannot do so in that state, even in a federal court. The basic right or lack of right and

not the forum is the decisive consideration in the *Erie R. Co. v. Tompkins* case and in subsequent decisions, including the above three cases decided June 20, 1949, in this court.

FAILURE TO FILE TIMELY ASSUMED TRADE NAME REQUIRED BY THE LAWS OF WASHINGTON

Under the foregoing, and under analogy of facts particularly as disclosed by *Woods v. Interstate Realty Co.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1245, 69 S. Ct. 1235, we submit that Schaefer's failure to file timely a certificate of assumed trade name as required by the laws of Washington, bars his right to litigate in this action.

Respondent brief presentation (pp. 46-50) of quotations of Rule 17(b), Rules of Civil Procedure, coupled with respondent's residence in the State of Oregon, and quotation of a portion of Rule 9(a), Rules of Civil Procedure, without disclosing the record change of pleadings as they were ordered, and also the citations to the three federal cases (p. 48) from one circuit and two district courts do not answer petitioners' presentation on Schaefer's failure to comply with Washington law regarding operations under an assumed trade name (Pet. Br. 39-41). The fact of Schaefer's failure to file assumed trade name could not be established affirmatively until Schaefer took the stand. Up to that very moment Schaefer could have complied with the Washington statute and have been thereby freed from any charge of non-compliance. Differently from respondent's said cited cases, it was a continuing right for Schaefer to exercise until he

was challenged, not some accomplished fact that could have been pleaded against him theretofore.

Schaefer did not by his pleadings, at trial, on the review by the Court of Appeals for the Ninth Circuit, or at all, until filing answering brief herein, invoke either Rule 17(b) or Rule 9(a) of Rules of Civil Procedure. His pleading is found in the record at R. 3, par. 2; R. 10, par. 17; petitioners' answer thereto admitted all that Schaefer alleged in his par. 2 (R. 13, par. 2) and denied on lack of knowledge and demanded proof of the allegations of his par. 17 (R. 16, par. 14) and of the allegations of his par. 1 (R. 2), as referred to in such par. 17 (R. 13, par. 1). There was no question of outlawing involved under respondent's cited federal rules, because the right of Schaefer to comply remained a continuing one, in his own hands and volition to meet at any time before challenge. He was challenged as soon as he disclosed he had not exercised the right accorded by the laws of the State of Washington (R. 179-180). Schaefer then filed his certificate of assumed trade name (Ex. 59) but the court in accepting such Ex. 59 ruled (R. 673):

> "THE COURT: I think that's a reasonable position. The complaint would have to be construed as amended to conform to the proof here. There is no allegation that the certificate was filed, and it is so considered, that it will be amended to show the filing as of this date, and it will be understood that the defendant's answer will be considered to show that it was not proper compliance."

Respondent's brief (p. 50) urges the United States Supreme Court to disregard the Washington statutory

requirements and invoke aforesaid cited Rules of Civil Procedure, following respondent's explanation (p. 49) of the statute so as to fit what Schaefer did do. Respondent does not cite either the one very recent case of the Washington Supreme Court or the aforesaid three United States Supreme Court cases.

The Washington Supreme Court on July 14, 1949, decided *Neill v. Bennett*, 134 Wash. Dec. 115, 116-117, ... P.(2d) ....., in line with its 1922 holding in *McCreery v. Graham*, 121 Wash. 466, 209 Pac. 692, holding that use of the Neill surname in the trade name of Neill Electric Co. excused filing a certificate under Secs. 9976, 9977 and 9980 of Rem. Rev. Stat. of Washington. In such *Neill* case it is stated, which conversely would reconfirm that otherwise it would be necessary to file a certificate of assumed trade name, as follows:

> "* * * It was not necessary to file or allege the filing of a certificate of assumed name to comply with Rem. Rev. Stat., §§ 9976, 9977 and 9980 (P.P.C. §§ 768-21, -23, -29), since the Neills were doing business under their true surname. See *McCreery v. Graham*, 121 Wash. 466, 209 Pac. 692."

From the foregoing it is respectfully submitted that Schaefer's failure to file assumed trade name of Concrete Construction Company, as required by the laws of the State of Washington, in view of the record as it was made both by Schaefer and by the other parties litigant at time of trial and as it has been maintained since, authorizes present issuance of writ of certiorari to the Court of Appeals for the Ninth Circuit so that the wrong done in that court may be

corrected conformable to the holdings of this Supreme Court of the United States.

WASHINGTON SUBSTANTIVE LAW OF CONTRACTS

Our petition (p. 2) quotes the Court of Appeals' own statement of controlling law, and (pp. 12-14) cites exact page locations of supporting declarations from the Washington State Supreme Court in 26 different controlling cases for the 8 subdivisional features in which "the Washington Substantive Law of Contracts is applicable" (to quote the Court of Appeals' exact wording, 173 F.(2d) 7, R. 2267). Those 8 features are the basis of our first 6 and 12th specifications of error (pp. 18-20) and are the identical first 6 enumerations in our summary of argument (p. 24). The same are then serially discussed, with quotations from such Washington cases, at pp. 25-39.

Respondent's brief (pp. 39-40) proposes substitution for the substantive law of Washington by quoting excerpts from two U. S. Supreme Court cases grounded on violation of federal statutes. Neither case, when studied with due relationship to controlling context, is applicable.

Considering the two federal cases: The quotation (pp. 39-40) from *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 90 L. ed. 1515, is found, respectively, at p. 688 of the U. S. report and p. 1523, 2nd col. of 90 L. ed. The word "But." beginnning the sentence, is omitted from respondent's quotation. That word "But" ties the proffered quotation to the 4 prior sentences in the paragraph omitted by respondent. The first omitted sentence discloses that the employer,

not the employee, was required to keep and failed to keep the records needed (Macri, under either his principal contract or the Schaefer subcontract, was not required to keep Schaefer's records). The second sentence adds that failure even through bona fide mistake to keep such records will not excuse the employer. With that preceding, we quote here the next two sentences omitted by respondent:

> "Nor is such a result to be contended by the rule that precludes recovery of uncertain and speculative damages. The rule applies only to situations where the fact of damage itself is uncertain."

The foregoing, we submit, annuls all applicability of respondent's quoted excerpt from such *Anderson* case.

Respondent's proffered other federal case, brought under the Sherman and Clayton Acts (p. 40) *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 90 L. ed. 652 (quotation from p. 261 of U. S. report and p. 662, 2nd col. of L. ed.), is grounded on conspiracy preventing the keeping of accurate books and accounts. The words "In such a case," starting respondent's quotation (p. 40) from such *Bigelow* federal case, refer to such conspiracy preventing the keeping of books and accounts. Petitioners Macri did not prevent respondent Schaefer from keeping any accounts. There is no such testimony. Respondent's brief (p. 9) states: "It is acknowledged that respondent did not keep records from which the exact amount or cost of the extra work could be determined * * *." Consonant with such admission, respondent's auditor

Hendershott (R. 1282-3) so testified and specifically stated (R. 1283):

> "Q. And did you have information available as to the number of man hours expended on excavation or fine grading?
>
> A. There were notations on the manifests, but I did not make any use of that.
>
> Q. What do you mean by manifests?
>
> A. The daily report from the superintendent on the job."

Respondent's brief then states (p. 40): "Respondent contends those two decisions govern the situation rather than the law of Washington, but will consider briefly petitioners' contentions." This is contrary to the Court of Appeals' own statement that "the Washington substantive law of contracts is applicable * * *" 173 F.(2d) 7 (R. 22).

Similarly, petitioners' brief (p. 28) explains how the case of *Olwell v. Nye and Nisson Co.*, 26 Wn.(2d) 282, 173 P.(2d) 652, by pp. 286-287 of Wash. report and p. 654 of such Pac. report, and the case of *Ritchie v. State*, 39 Wash. 95, 81 Pac. 79 (p. 36), by p. 99 of the Wash. report and p. 80 of such Pac. report, both cited by the Court of Appeals, 173 F.(2d) 8 (R. 2268-9), are not germane. Respondent's brief does not answer this.

Likewise, respondent's brief makes no answer to petitioner's presentation (Pet. Br. pp. 36-37) of the pivotal Washington case of *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 125 P.(2d) 275, as quoted from at such place, and the declared supporting early Washington case of *Goss v. Northern Pac.*

Hosp. Assn., 50 Wash. 236, 96 Pac. 1078, quoted from at Pet. Br. Append. 2. This is the Washington controlling law, wholly unanswered by respondent.

(Respondent's Washington citations analyzed)

Petitioner here respectfully presents brief analytical consideration of all of the Washington cases cited or quoted from by respondent's brief, none of which, it is submitted, detracts from the controlling Washington substantive law of contracts as set forth in petitioners' opening brief.

Respondent's brief (pp. 17, 18) cites *Patrick v. Bonthius*, 13 Wn.(2d) 210, 124 P.(2d) 550. Pages 213-214 of the Wash. report and p. 552, 2nd col. of the Pac. report make that *Patrick* case entirely of negative character. Such case goes no further than to hold that substantial good faith compliance with contract terms allows recovery of the contract price, less the amount required to cure defects. In that same 13 Wn.(2d) volume is the aforesaid case of *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 125 P.(2d) 275, which is positive in declaration against recovery for delays where the contract terms preclude such claim. Pertinently, the Schaefer subcontract also provides for delays (Ex. 5, par. 5, quoted at p. 35, Pet. Br.).

Maryland Casualty Co. v. City of Tacoma, 199 Wash. 72, 90 P.(2d) 226, cited Resp. Br. p. 14, is distinguishable at p. 87 of the Wash. report and p. 233, 1st col., of the Pac. report. It is there stated that while the principal contract provided against delays, the subcontract in that case did not. Schaefer's

subcontract does provide for delays (Ex. 5, par. 5, quoted p. 35, Pet. Br.), thereby making the case of *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 125 P.(2d) 275, absolutely controlling and applicable, instead of such *Maryland Casualty Company* case proffered by respondent.

Respondent's citation (p. 15) to *Schuehle v. City of Seattle*, 199 Wash. 675, 92 P.(2d) 1109, is distinguishable at p. 681 of the Wash. report and p. 1111, 2nd col., of the Pac. report, because there it is stated that the "* * * changes and deviations were material and substantial and were not covered by the contract," so that *quantum meruit* recovery was allowed. The case deals largely with the contemplation of or what should have been contemplated by the parties. It is distinguishable because Schaefer's subcontract definitely provided for alterations and changes (Ex. 5, Art. 3, Sec. 3). Schaefer furnished no statement for any claimed extras, regardless of whether or not they were ordered by Macri (R. 341, 1452, 1471, 2155).

Respondent's citation (p. 15) of *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126, is without explanation to the court that such case is primarily directed at the surety's bond liability and that, so far as the defendant construction company, as principal contractor, is concerned, the case states (p. 260 of the Wash. report and p. 128 of the Pac. report), respecting $1238.25 demanded, that "This sum was reached by *applying the rates* fixed for hauling under the forfeiture clause *of the contract*" (Italics ours).

The distinction for the holding in *Western Asphalt Co. v. Valle*, 25 Wn.(2d) 428, 171 P.(2d) 159 (cited Resp. Br. 25), is at p. 437 of the Wash. report and p. 164 of the Pac. report, where it is compared with and distinguished as a "contract implied in fact" from the case of *Chandler v. Wash. Toll Bridge Authority*, 17 Wn.(2d) 591, 137 P.(2d) 97, quoted at page 26 of petitioners' brief. Also, respondent's brief states, p. 25: "Respondent acknowledges that there can be no implied-in-fact contract contrary to an express contract." Therefore, we respectfully redirect the court's attention to the quotation from the *Chandler* case at p. 26 of petitioners' brief.

Respondent's citation (p. 21) to *Luther v. National Bank of Commerce*, 2 Wn.(2d) 470, 98 P.(2d) 667, is based upon an oral contract to devise. The gist of the contract law involved is at pp. 477-8 of the Wash. report and p. 671 of the Pac. report, none of which in any manner detracts from the positive declarations of the substantive contract law of Washington quoted and specifically cited by reference to page numbers in petitioners' brief.

Automatic Canteen Co. of Washington v. Automatic Canteen Co. of America, 182 Wash. 133, 45 P. (2d) 41, cited at p. 43 of respondent's brief, is followed by the statement: "in which the court held that damages for loss of future profits may be allowed." This is not in accord with the court's holding, set out at p. 142 of the Wash. report and pp. 44-45 of the Pac. report, denying claimed damages.

Respondent's Br. p. 42, in discussing *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 182 P.(2d)

75, states: "The court stressed this requirement:" and then purports to quote from such case, when, in fact, the proffered substance is a partial subquotation and the latter subjunctive portion only of a sentence used in that case at p. 250 of the Wash. report and p. 81 of the Pac. report. The full context of the subquoted portion of a sentence and of the whole paragraph from which such partial subquotation is lifted support use and quotation of that case in petitioners' brief, pp. 13, 32, 33.

Respondent's brief at pp. 14, 16, 41, mentions the case of *Nelson v. City of Seattle*, 180 Wash. 1, 38 P. (2d) 1034, without any citation to any page thereof for court consideration. Also, respondent's brief does not answer petitioners' presentation (Pet. Br. 28-29) that the Court of Appeals' citation to page 28 of such *Nelson* case was inapplicable. Respondent's brief (p. 21) quotes from such *Nelson* case, but omits, without so indicating, from its quotation the beginning of the first sentence partially quoted. The words omitted are: "But for reasons unnecessary to state here." Such omitted words, coupled with the full consideration of the Nelson-Vigilant claims at pp. 16-20 of the Wash. report and pp. 1040-1041 of the Pac. report, explain why such deduction was made and thereby materially detract from the claimed controlling force of respondent's quoted and eviscerated context.

In passing, and in addition to our references and quotations from the *Nelson* case, we here respectfully call the court's attention to the fact that on p. 14 of 180 Wash. and p. 1039 of 38 P.(2d) report the court

recognizes a situation between respective performances of the work similar to that urged by Schaefer here, and comments that the claims, comparable to those of Schaefer here, are conjectural, and also that at p. 25 of such Wash. report, p. 1043 of such Pac. report, the court notes: "Each kept records as to causes of delay."

We respectfully, therefore, refer the court to our citations and quotations for the substantive law of contracts in the State of Washington as epitomized at pp. 12-14 of petitioners' brief, which the Court of Appeals declared must govern (173 F.(2d) 7, R. 2267).

UNANSWERED LAW FEATURES

Respondent's brief (p. 43) states that, except for one case in 182 Wash. there mentioned and above covered in this reply brief, "None of the remaining cases cited by petitioners merits discussion, * * *." That statement is in lieu of an answer to the propositions supported by pronouncements of the Supreme Court of Washington with exact page citations in petitioners' brief (Pet. Br. pp. 12-14). Palpable examples of such avoidance by respondent are failure to answer subdivision 6 "Schaefer's Failure to Minimize His Damage Prevents Recovery," with two quotations and numerous exact page citations (Pet. Br. pp. 38-39), and the rule of 2 Fed. Law of Contracts, Sec. 487, quoted Pet. Br. p. 30, and making *U. S. v. Zara Cont. Co.*, 146 F.(2d) 606, not in point, but completely consonant with *Hawkins v. U. S.*, 96 U.S. 689, 24 L. ed. 607, at 610 (quoted Pet. Br. p.

30), and *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 266, 70 L. ed. 938, 940, supporting the substantive law of contracts of the State of Washington.

REFUTATION OF SUNDRY ASSERTIONS

The following is submitted in reply only to refute respondent's minutia tending to detract from the real issues above discussed.

The charge is made (Resp. Br. p. 29) that "Petitioners now contend, however, *for the first time*, that the judgment was based upon simply a compilation, Exhibit 63, and not upon respondent's original books and records (Brief 4, 34)." (Italics ours) This is refuted by reference to the record (R. 139(2)) for presentation to the Court of Appeals and R. 2202 with R. 1243-1245 for presentation to the district court at trial. Petitioners, as cross-appellants, set out the same claim of error to the Court of Appeals in their opening brief at p. 29. They discussed the same at pp. 73-74 therein. This is set forth in Appendix I hereto, and we respectfully ask the court to consider it with aforesaid record citations.

The statement in Resp. Br. p. 20 that Schaefer "had executed a performance bond" is refuted by the bond itself, Ex. 34, which he did not sign and which the petitioners did not know was unsigned (R. 1449 with 1359).

Respondent's brief p. 40, respecting 14.5% overrun of concrete, is refuted by Ex. 17a, the concrete engineer's report, coupled with the testimony of the government's engineer in charge (R. 1512), and with Schaefer's own witness Bufton's testimony at

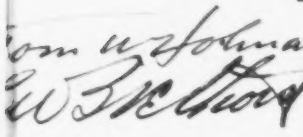
R. 1207, read with R. 1205, definitely establishing that 5% of overrun of concrete indicates unskilful operations.

The tabulation at Resp. Br. 30 omits deducting 20% of overhead on $32,614.66 admitted as timely and currently paid. The mathematical premise and tabulations (Resp. Br. pp. 35-39), wherein it is sought to demonstrate efficiency and reasonableness, answer themselves by reference to the evidence as a whole. None of this is properly a consideration for passing on a petition for writ of certiorari, but can and will be readily met, if this Court should desire to have hearing on factual features also.

CONCLUSION

In conclusion, it is respectfully submitted that the Washington cases upon the substantive law of contracts as submitted by petitioners and as amplified by the later holdings of this Supreme Court of the United States and of the State of Washington discussed in this reply brief, call for issuance of writ of certiorari as petitioned, and that, upon review, relief as prayed in petitioner's opening brief herein should be granted.

Respectfully submitted,



TOM HOLMAN,
S. W. BRETHORST,
Attorneys for Petitioners
Sam Macri, Don Macri and
Joe Macri

APPENDIX I

Reproduction from pp. 73-74 of brief of cross-appellants Macri in Court of Appeals, Ninth Circuit.

"Further, with respect to the amount allowed Schaefer, the only evidence offered to support such a figure is Ex. 63, which purports to be a compilation from Schaefer's original books of account. The books themselves when offered in evidence were excluded. This was error. 20 Am. Jur., Evidence, 1051. Nor was there any attempt to segregate the costs (Tr. 1298-9). The witness who prepared the compilation did not keep the books. Schaefer's bookkeeper did not testify (Tr. 1265). Continuing objections pointing out the deficiencies of Ex. 63, overruled by the court, are evidenced in the record (Tr. 1245, 1251, 1252, 1259, 1265, 1266, 1267, 1275)."

SEP 21 1949
CHARLES ELMORE CROPLEY
CLERK

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Defendants,

CONTINENTAL CASUALTY COMPANY, a corporation,

Additional Petitioner.

Reply of Continental Casualty Company To Respondent's Brief Opposing Certiorari

EUGENE D. IVY
ELWOOD HUTCHESON
GEORGE W. WILKINS

Attorneys for Additional Petitioner, Continental Casualty Company

Miller Building
Yakima, Washington

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EUGENE D. IVY

ELWOOD HUTCHESON

GEORGE W. WILKINS

Attorneys for Additional Petitioner, Continental Casualty Company

Miller Building
Yakima, Washington

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Respondent,

A. J. GOERIG and CLYDE PHILP, individuals and co-partners,

Defendants,

CONTINENTAL CASUALTY COMPANY, a corporation,

Additional Petitioner.

This reply to respondent's brief is respectfully submitted by Continental Casualty Company, additional petitioner and statutory surety for the Macris, petitioners herein.

In Cause No. 791, preceding term, this Court last June denied Continental's petition for certiorari, but said cause is still pending undetermined on Continental's petition for rehearing. As pointed out therein, it would be grossly unjust and unthinkable for Macris' petition for certiorari to be granted or the judgment as to Macris reversed unless

similar relief is granted to Continental. Manifestly the liability of the principal may exceed the liability of the surety, but on the other hand the liability of the surety can never be greater than the liability of its principal. Consequently, if there is no liability on the part of Macris, there can be no liability on the part of Continental, which is merely the surety on Macris' statutory payment bond under the Miller Act.

Continental adopts and incorporates by reference all of the arguments and authorities cited in the opening brief and reply brief of petitioners, Macris, herein.

1. NO SOUND LEGAL BASIS FOR LIABILITY OF CONTINENTAL.

Moreover, we sincerely believe and respectfully submit that respondent's brief herein itself clearly establishes that under these facts there can be no liability of Continental herein.

Respondent's brief concedes, as it necessarily must: (1) That there was originally a written subcontract between Macri and Schaefer; (2) that Schaefer has heretofore been paid practically the full agreed contract price thereunder; (3) that Schaefer's claim arises from Macri's alleged breaches of said contract, thereby (a) increasing Schaefer's expense of performance of his subcontract, and (b) resulting in Schaefer performing part of the work to be done by Macri thereunder; (4) that Schaefer's case is based

primarily on alleged oral promises *of Sam Macri* to pay Schaefer his *additional costs* of performance; (5) that Continental had no knowledge of any of these matters and never consented thereto; (6) that Schaefer never agreed or obligated himself to perform any additional work whatever other than that covered by his original written subcontract—in other words, there was never any mutually binding contractual modification thereof nor any additional contract entered into; and (7) that Schaefer kept no record from which his *additional costs* of performance could be determined.

Yet notwithstanding these facts, all of which are conceded by respondent, he has erroneously recovered, and now seeks to sustain, a judgment against Continental for damages for Macri's breaches of the subcontract. He has erroneously recovered and seeks to sustain a judgment against Continental not only for his alleged *additional costs* of performance, but also his *entire* costs on the job, and added thereto 20% for overhead expense, plus 10% for profit.

But obviously Macri was not an agent of Continental. In the absence of a new mutually binding contract or mutually binding modification contract, clearly Continental did not assume any additional obligations merely by reason of gratuitous oral promises of Macri to pay additional casts to Schaefer, wholly unknown to Continental.

Likewise, a promissory estoppel, if any, on the part of Macri clearly would not create an estoppel as against Continental. Admittedly Continental had no knowledge of these alleged breaches of the subcontract by Macri nor or Macri's alleged oral promises. Continental never made nor authorized any subsequent promises or agreements. So long as the full original contract price was paid, Continental had no additional liability, assumed no additional obligation, and never became in any manner estopped to say so.

It is fundamental that where there is an express contract, the law will not imply a contract. Here there was an express written contract and no subsequent modification contract. There was never any new contract entered into. Schaefer flatly refused to assume any additional contractual obligations whatever. As stated by the district court, he continued to complain to Macri concerning the latter's performance throughout the job. (R. 2213-5). Consequently under these circumstances the law will not imply a contract, and Schaefer cannot recover on either an implied in fact or quasi contract. Certainly this is true as against Continental, which made no additional promises and which never estopped itself.

The entire basis of the decision of the court of appeals, namely, that there was a new agreement or contract between Macri and Schaefer, is completely contrary to the

evidence, contrary to the decision of the district court, who saw and heard the witnesses, and contrary to the statements in respondent's brief. The attempt of the court of appeals to distinguish this case from contrary decisions in other circuits is therefore wholly unsound.

Nor is there any merit to respondent's contention (p. 8) that he is not seeking recovery of damages for breach of contract. While it is true that he is seeking recovery in form under the legal theory of quantum meruit, nevertheless his whole case, if any, is founded upon recovery of additional compensation by reason of Macri's breach of contract. Regardless of form or technical legal theory, the substance of respondent's claim is therefore clearly recovery of damages based on Macri's breach of contract.

The district court denied recovery on respondent's first cause of action based on an alleged express contract and permitted recovery only on the second cause of action based on implied or quasi contract. However, it is obvious and has at all times been conceded by respondent that if Macri had properly performed his obligations under the subcontract, respondent would have no standing in court at all. Looking through form to substance, this case is nothing more than an ingenious attempt to recover damages or additional compensation for Macri's breach of

contract. It is well settled that this may not be done, especially as against the statutory surety.

At page 14 of his brief, after stating his principal contention, respondent admits:

> "*The basis of this contention is* that the District Court and the Court of Appeals found the following facts: (1) *Petitioners were guilty of willful and negligent material breaches of the subcontract* through the performance of the work by respondent, in the respects mentioned in the statement of the case." (All italics are ours).

Again at page 31 respondent states:

> "As previously pointed out, it is not entirely clear whether Mr. Macri promised Mr. Schaefer to pay all of respondent's costs, *or only his extra costs due to petitioners' breaches of the subcontract.*"

It is perfectly clear therefore that respondent's entire case is predicated upon recovering additional compensation due to Macri's breaches of the subcontract.

Respondent seeks to bolster his principal contention (p. 17-18) by resort to the substantial performance doctrine, namely, that where a *plaintiff* has substantially performed his contract, he can recover thereon, less deductions for defects to be corrected or omissions to be supplied, except where the plaintiff wilfully fails or refuses to perform his contract. But in this case whether or not Macri *wilfully* breached the contract is wholly immaterial. *Macri is not the plaintiff* and is not seeking to rely upon

the substantial performance doctrine. Schaefer is not relying thereon, as no one disputes that he performed his contract and is entitled to, and has in fact been paid, his original agreed contract price of $26.00 per cubic yard of concrete. Respondent's case is weak indeed when he relies upon any such far fetched and wholly inapplicable principle.

Respondent concedes (p. 25) that *"there can be no implied-in-fact contract contrary to an express contract."* Here there was an express contract that Schaefer would do this job for $26.00 per cubic yard of concrete installed, or the total agreed contract price of $35,271.12, all of which (with a slight exception) has been fully paid. The matter being covered by an express contract, upon fundamental principles the law will not imply a contract for the payment of a greater amount.

Respondent concedes (p. 25-27) that there was no mutually binding express bilateral contract entered into between these parties for the performance of additional work other than that covered by the original subcontract. The record is undisputed that there was none. It is therefore absurd for respondent to contend that there was a valid binding enforceable "unilateral" contract between these parties. It is well settled in Washington as elsewhere that mutuality and mutually binding obligations are essential for the existence of valid enforceable contract.

In *Brown v. Brew*, 99 Wash. 560, 169 Pac. 992, the court said:

> "A promise for a promise is a sufficient consideration for any contract, but *there is no dispute in the law that such promises, in order to be binding, must be mutual, concurrent and obligatory upon both parties to the contract; both parties must be bound at one and the same time, otherwise there is no contract.*"

In *Miami Coca Cola Bottling Co. v. Orange Crush Co.*, 296 Fed. 693, (CCA 5) the court said:

> "The appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable." (Citing numerous cases).

See also to the same effect:

Willard Sutherland & Co. v. U. S., 262 U. S. 489, 67 L. Ed. 1086; *Mowbray Pearson Co. v. Stanton*, 109 Wash. 601, 187 Pac. 370, 190 Pac. 330; *Brewster Dist. Unit v. Monroe*, 117 Wash. 21, 200 Pac. 841.

Respondent concedes (p. 27) that there was never any rescission of the original written subcontract. Consequently the same is binding upon him, and he cannot recover additional compensation over and above $26.00 per cubic yard in excess of the agreed contract price.

Schaefer's claim is for not only additional labor, such as excavation and fine grading, not called for by his subcontract, *but is also for damages for delay and additional*

costs of performance of the same identical work required of him by his subcontract, plus overhead and profit. This is repeatedly conceded at pages 7 and 32-35 of respondent's brief. In the absence of a rescission, and admittedly there was none, the contract remains in effect, and Schaefer cannot recover a dime more than the original agreed contract price from the petitioner, even though the job may have been somewhat delayed by Macri. Schaefer's claim is composed of these two separate claims — (1) additional work not called for by his subcontract, and (2) additional cost of performing his subcontract—and there is no evidence whatever which establishes the amount of recovery upon either of them separately. Clearly he is not entitled to recover upon either.

The case principally relied upon by respondent and the only case cited by him involving liability of a surety under the Miller Act, *U. S. v. Zara Contracting Co., 146 F.* 2d 606, is clearly distinguishable. There, except for one $100 item, the subcontract was for the entire job covered by the principal contract. Two months after commencement of the work the principal contractor wrongfully and unjustifiably prevented the subcontractor from completing the work, and the principal contractor finished performance thereof. There was undoubtedly a total rather than partial breach of contract. The subcontractor did not continue performance but ceased and was in fact prevented from

further performance. The court merely held that under such circumstances the subcontractor could recover on quantum meruit for such past performance. The amount of recovery, however, was substantially less than the total contract price. Everything that was done by the subcontractor was work required by both the subcontract and the principal contract, and consequently the surety was liable. There was no recovery of profit and the recovery was based on plaintiff's "*costs.*" The principal contention of the surety apparently was that it was not liable for rental of equipment. The court also there held at page 609 that the plaintiff's' claim for extra compensation in addition to the contract could not be maintained if he were relying upon the express contract. Also there the principal contractor had received additional compensation from the government for the same work performed by the subcontractor.

At page 611 the court said:

> "*It is therefore appropriate here . . . to make use of the contract as fixing the basic price.*" (Citing authorities).

For the foregoing numerous reasons that case is clearly distinguishable, and actually it supports our position rather than that of respondent, as all of the labor there performed was supplied under both the principal contract and the subcontract and was used in the prosecution of said work;

and therefore the amount sued for and recovered was *within the contract rather than outside of the contract.*

Here Schaefer is seeking to recover from the Miller Act surety amounts which are outside of the contract rather than within the contract. This cannot legally be done. *Schaefer's claim is directly predicated on Macri's alleged breach of contract, and not on respondent's furnishing of labor and material pursuant to contract.*

This increased cost of performance was outside of the scope of respondent's obligations under the subcontract and outside of the scope of Macri's obligations under the prime contract with the Government. What was done by Schaefer, not already paid for, was not required by any of the terms of the contract, but became necessary solely because of Macri's breach of the subcontract.

The authorities clearly establish that in such case there is no liability of the Miller Act surety.

Friestedt Co. v. U. S. Fireproofing Co., (CCA 10), 125 F. 2d 1010; *U. S. v. Maryland Casualty Co.,* (CCA 5), 147 F. 2d 423, affirming 54 Fed. Supp. 290; *U. S. v. John A. Johnson & Sons,* 65 Fed. Supp. 514, 526-532; *U. S. v. Seaboard Surety Co.,* 26 Fed. Supp. 681; *McEvoy v. U. S.,* 322 U. S. 102, 88 L. Ed. 1163.

There is therefore clearly no merit in any of respond-

ent's contentions as to liability of Continental or Macri upon any of the grounds urged in respondent's brief.

2. ACTION IS BARRED BY SUBCONTRACT PROVISION AS TO DELAY.

Contrary to respondent's contention (p. 44) paragraph 5 of the subcontract quoted in petitioner's brief (p. 35) shows that respondent's sole remedy for delay was to secure additional time for performance.

This provision 5 of the subcontract was quoted and this contention made at pages 7, 8 and elsewhere in Continental's opening brief in the court of appeals. That court erroneously denied this contention, although not discussing the same in the opinion.

As shown at pages 32 to 35 of respondent's brief, his claim is very largely an attempt indirectly to recover damages for delay by recovery of alleged increased costs of performance plus profit and overhead.

Continental has never waived this provision of the subcontract by agreeing to pay respondent's costs or otherwise. Continental has never had knowledge of nor consented to any abrogation of this or any other portion of the subcontract. The same clearly precludes recovery by respondent herein.

3. FAILURE TO FILE TIMELY ASSUMED TRADE NAME.

Contrary to respondent's contention (p. 46), the three recent decisions of this Court on June 20, 1949, and particularly *Woods v. Interstate Realty Co.*, U. S., 93 L. Ed. (Adv. Op.) 1245, 69 S. Ct. 1235, clearly establish that this judgment must be reversed because of respondent's failure to comply with the Washington statute requiring timely filing of the assumed name certificate prior to the trial.

Manifestly, Rule 17 (b) of the Rules of Civil Procedure relates to capacity to sue in the sense of age, mental capacity, etc. Certainly this Court in adopting that rule never intended to abrogate the statutory requirements of the state in which an action is brought.

It is useless for respondent to rely upon the law of Oregon because he failed to prove that he had filed any such certificate *in either Oregon or Washington* prior to the trial.

It is well settled in Washington and generally that in the absence of pleading and proof to the contrary, the law of another state is always presumed to be the same as the law of the State of Washington.

Plath v. Mullins, 87 Wash. 403, 151 Pac. 811; *Marston v Rue*, 92 Wash. 129, 159 Pac. 111; *Freyman v. Day*, 108 Wash. 71, 182 Pac. 940; *Williams v. Great Northern Ry. Co.*, 108 Wash. 344, 184 Pac. 340; *Laughlin v. March*, 19 Wn. 2d

874, 145 P. 2d 549; *Norm Advertising v. Monroe*, 25 Wn. 2d 391, 171 P. 2d 177.

Since this Court has now definitely determined that neither a resident nor a non-resident of a state may maintain an action in either the state or federal courts therein without complying with the state's statutory requirements of the forum where the action is brought, and Schaefer failed to do so, it necessarily follows that this judgment must be reversed and the action dismissed for failure to comply therewith.

Continental therefore respectfully submits that its petition for rehearing should be granted, that the petitions of both Continental and Macris for writs of certiorari should be granted, and this clearly erroneous judgment should be reviewed and reversed and the action dismissed.

Respectfully submitted,

EUGENE D. IVY

ELWOOD HUTCHESON

GEORGE W. WILKINS

Attorneys for Additional Petitioner, Continental Casualty Company

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 135

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners,

Petitioners,

v.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,

Respondent,

A. J. GOERIG and CLYDE PHILP, individuals and copartners,

Defendants,

CONTINENTAL CASUALTY COMPANY, a corporation,

Additional Petitioner.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

OLSON & PALMER,
CUTLER W. HALVERSON,
Miller Building,
Yakima, Washington;

STUART W. HILL,
Equitable Building,
Portland, Oregon,

Attorneys for Respondent.

STEVENS-NESS LAW PUB. CO., PORTLAND

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In the Supreme Court
of the United States

OCTOBER TERM, 1948

No.

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners,

Petitioners,

v.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,

Respondent,

A. J. GOERIG and CLYDE PHILP, individuals and copartners,

Defendants,

CONTINENTAL CASUALTY COMPANY, a corporation,

Additional Petitioner.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The District Court entered judgment against petitioners and the Continental Casualty Company, their surety. On the appeals of all of such defendants, the judgment was affirmed by the Court of Appeals.

The petition of the Continental Casualty Company for writ of certiorari has already been denied by the Supreme Court. That company has now filed a petition for rehearing.

Throughout the petition and supporting brief, including the questions presented and argument, petitioners have persistently failed to mention or consider certain facts which were found to exist by the District Court and the Court of Appeals, and which are as prominent in this case as the view of a mountain from a plain.

We refer particularly to promises made by Mr. Sam Macri, one of petitioners, to respondent with respect to compensation to be paid to respondent for labor and materials furnished by him, in addition to the amounts which would ordinarily be required in the performance of the subcontract. These promises are stated fully hereafter in the statement of the case.

By the terms of the subcontract entered into between petitioners and respondent, the latter agreed to furnish all labor and necessary equipment to do all of the concrete work, including the erection of the wooden forms and the installation of reinforcing steel. It was also agreed in the subcontract that all of the excavating and all of the materials necessary for the performance of the subcontract by respondent, were to be furnished by petitioners, with the exception of the form wire, nails, and curing material. It was further agreed therein that the excavating was to be done, and the materials were to be supplied by petitioners in accordance with the

plans and specifications and in proper time for performance of the subcontract by respondent (R. 99, 100). The excavation required of petitioners by this instrument included what is called fine grading, which consisted in hand grading to specific dimensions after a power shovel had removed earth to within 3 to 5 inches of such dimensions.

Both the District Court and the Court of Appeals found that from the time respondent commenced to perform the subcontract until his work was completed petitioners were guilty of breaches of their obligations under the subcontract in certain respects which are well stated in the opinion of the Court of Appeals in these words (173 Fed. 2d 5, 7):

> "The Court further found that Schaefer's performance was diligent, but that the Macris had breached the subcontract in that they failed to make the excavations in the proper manner so that Schaefer's carpenters had to make extra excavations in order to install the forms. The Macris also failed to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work. The Macris also failed to furnish the proper quality and quantity of lumber required, which hindered and delayed Schaefer in the performance of his work. Macris' breaches were found willful and negligent and they continued and persisted throughout the entire performance of the subcontract."

It will be observed in the last sentence of that quotation that both courts found that these breaches of petitioners were willful and negligent and continued throughout the performance of the subcontract by re-

spondent. This finding is completely ignored by petitioners.

The promises of Mr. Macri, which are wholly disregarded in petitioners' brief, were made in two conversations with Mr. Schaefer at meetings of these men at the scene of this project. These meetings were made necessary by the fact that petitioners were not performing their obligations under the subcontract.

At the first meeting, on April 29, 1944, approximately six weeks after the subcontract was executed, the two men went into the field and examined a number of excavations. All proved to be defective. Mr. Macri then asked Mr. Schaefer to do the fine grading, saying that he would pay for it, but Mr. Schaefer refused to undertake the work and asked Mr. Macri to have sufficient men there so he wouldn't be delayed, that the excavations be done according to specifications, and that ample lumber be supplied in time in order that respondent's men could pour not less than 20 yards of concrete per day. Mr. Schaefer reminded him of a previous promise to so perform his obligations that the respondent would be off the job by September 15th. Mr. Macri replied, "You'll be out of here by September 15th, there isn't gonna be anybody lose any money on our job; we'll get this thing straightened out and get going. * * * I'll pay you for the expense of excavating that you do here (R. 221 to 224)." Mr. Schaefer's reply was, "Who's going to pay for the extra expense of building panels in the way that we're now required to build panels, or setting these panels in holes like this, * * * instead of

to specification, or stripping the forms out of these holes, doing the necessary excavating to get them out, wrecking them, having to haul them all back to the yard for repair, instead of to structures ahead?" Mr. Macri said, "I'll pay you for all the extras, just get going." Mr. Schaefer replied, "You're going to pay for all additional cost and expense." Mr. Macri then said, "I told you that before." Mr. Schaefer then added, * * * "You're going to have the necessary men and equipment in here, and you're going to get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day (R. 225 to 227)." Mr. Macri then said, "Well, that's it, that's all right (R. 227)."

Respondent returned to the project on May 19th and found no work going on and no lumber. The side walls still required additional digging to accommodate the forms and there were no excavations ready for forms. Respondent then instructed his superintendent to take all of his men back to Portland with the exception of two (R. 279, 280, 282).

Mr. Schaefer met Mr. Sam Macri again on June 15th, on the project. There was still nothing being done. The shovel was broken down and was in the yard. Petitioners did not have a hand-excavating crew on the job. In fact, there was no one on the job (R. 284, 285, 286). At that time enough forms had been prepared by respondent to permit the assembly of about 72 to 75 structures, the term used to designate the forms when ready to receive concrete. There were no excavations ready for the placing of the structures, however, and,

in fact, none was ready to receive forms until June 29th.

At the meeting of June 15th another conversation was held between Mr. Macri and Mr. Schaefer which was substantially similar to that of April 29th. After discussing the general situation, Mr. Schaefer said to Mr. Macri, "We won't be through with this job by September 15th." Mr. Macri replied, "Nobody's lost any money on my job. We'll be out by September 15th. This little excavating, you go ahead and do it. We'll pay for it." Mr. Schaefer then said, "That isn't all you're going to pay for. You're going to pay all the costs, all expenses, all the extras." Mr. Macri replied, "Well, I told you that before; quit arguing. * * * You're not going to have to wait for anything any more. You just get back here and get going (R. 286, 287)."

The District Court found that these conversations occurred and that respondent relied upon the statements of Mr. Sam Macri (R. 102, 103, 2213-2215). While the Court of Appeals did not expressly approve such findings, it clearly adopted them by implication. The latter court said in its opinion (173 Fed. 2d 5, 7, 8):

> "The court further found that Schaefer had made many complaints to the Macris regarding the latter's defaults; that the Macris induced Schaefer to continue performance and to perform some of the work the Macris were to do, and that Schaefer would be compensated for the additional expense because of the adverse conditions created by the Macris. The court found that 'there was an implied agreement or quasi-contract that * * * Schaefer was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra

burdens imposed upon (Schaefer) by the Macris' breaches.' "

* * * * *

"The district court held that there was an 'implied agreement or quasi-contract' to the effect that the Macris would pay Schaefer the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon Schaefer by the Macris' breach and failure to perform their part of the subcontract. The Macris claim there is no substantial evidence to support the finding that they breached the subcontract. While the testimony is conflicting, the record contains sufficient evidence to support the finding, and this court will not weight the evidence in such a case. Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. We cannot say that this finding is clearly erroneous.

"Since the court found that the subcontract was willfully breached by the Macris and that they induced Schaefer to continue performance and even to perform part of the Macris' work, Schaefer should be allowed to recover in excess of the stipulated contract price for the extra work performed in reliance on the Macris' statements, which were intended to induce reliance."

In spite of diligent effort on his part, respondent was not able to complete the performance of the subcontract until April 1945 because of the willful and negligent failure of petitioners to perform the obligations imposed on them by the subcontract. Exhibit 51 (R. 572, 578, 586), which is considered in some detail under heading No. 2 in this brief, and the testimony of two witnesses, one of whom was wholly disinterested, indicates clearly that respondent could have fully performed the subcontract in from 3½ to 4 months under normal conditions (R. 464, 572, 586, 1160-1162).

Petitioners insist that respondent has been seeking the recovery of damages for breach of contract. It is clear, however, that the only count in the amended complaint on which the District Court permitted a recovery is the one based on quantum meruit (R. 103, 109, 110). The opinion of the Court of Appeals indicates beyond doubt that both courts regarded the judgment as based on the reasonable value of the labor and materials furnished by respondent plus overhead and profit, and not upon damages for breach of contract. This is plain in view of the language already quoted from the opinion and the following (173 Fed. 2d 5, 8):

> "Whether the theory is called implied-in-fact contract, quasi-contract, or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit."

It is true that the District Court found that there was no express contract, or meeting of the minds, that respondent was to do what fine grading was required by the defective conditions of the excavations. Respondent stated more than once that he did not wish to assume the obligation of fine grading the excavations; consequently, there was no express contract that he would do that work. He did perform much of it, however, at the request of petitioners and with their knowledge, because he had to do it to get his own work done. As a result, an implied-in-fact contract that petitioners would pay for such work could and did arise, and the mere fact that respondent declined to promise to perform it did not prevent the creation of an implied-in-

fact agreement when he did perform part of it under necessity.

Petitioners declare: "Schaefer repeatedly stated that he refused absolutely to do any other work than what his subcontract called for (Petition 10, Brief 25)." It is true that respondent refused to promise to perform any obligations other than those set forth in the subcontract, but it is equally true that he did a tremendous amount of work which he was not obligated to do by the subcontract under such circumstances as to give rise to an implied-in-fact promise by petitioners to pay for it. He was compelled to do the extra work in order that he might perform his own obligations under the subcontract. Petitioners stood by and watched him do it, accepted such work without protest, and in fact urged him to go ahead and do it. Petitioners received full benefit from the extra work done by respondent by being paid by the United States Government.

It is acknowledged that respondent did not keep records from which the exact amount or cost of the extra work could be determined, the reason for such failure being that it was physically impossible in most instances for him to do so. There is ample testimony in the record, however, to permit a determination with reasonable certainty of the reasonable value of the extra labor and materials furnished by respondent. Both the District Court and the Court of Appeals concluded that the amount of respondent's increased costs was established with reasonable certainty. In view of the fact that petitioners still contend that there was insufficient

proof insofar as the amount of recovery was concerned, this question will be more fully considered in the argument under heading No. 2 in this brief.

Petitioners declare that there is a manifest duplication of overhead and profit in the judgment (Brief 4). A study of the calculations appearing under heading 2 of this brief will demonstrate that this is not true.

Petitioners say that there was an overrun of concrete of 14.5% brought about by admittedly unskillful subcontract operations (Brief 4). This is an entirely unfair and unjustifiable interpretation of the testimony relied upon (R. 1205, 1207). It is admitted that there was an overrun of 14.5%, that is, that 14.5% more concrete was poured than the estimate made by government engineers, but it is emphatically denied that respondent had anything to do with such overrun beyond an insignificant amount.

The testimony evidently relied upon by petitioners (R. 1205, 1207) was given by Mr. Bufton. He said that spillage, and small quantities of concrete wasted at the end of the day because there is no place to put it, should not exceed from 2% to 5% of the total quantity poured. There was very little spillage on this project, less than one yard, and very little waste (R. 557, 558), and it is therefore clear that the total quantity of overrun falling into these two categories was only a very small fraction of the 2% tolerance approved by Mr. Bufton.

The forms constructed by respondent of wood panels for the reception of the concrete, were assembled ac-

cording to specifications (R. 477, 478, 480). The real cause of the overrun was the excessive quantity of concrete required to fill the voids resulting from the over-excavation done by petitioners' own men (R. 557). In a number of instances the excavations were too deep; this meant that excessive quantities of concrete were required to bring the floor of the finished structures up to the proper grade (R. 456, 677). In a great many instances an earth wall served as part of a form in place of a wood panel; many of these walls were overexcavated or were out of line and as a result excessive quantities of concrete were used to fill these voids (R. 457, 591, 677, 679). The testimony establishes and both courts below found that one of the most serious defects in petitioners' performance was their failure to excavate properly (R. 100, 220, 457).

Petitioners were paid by the Government on the basis of 1,356 yards, the number estimated by engineers of the Bureau of Reclamation. We have used exactly the same number in our calculations under heading 2 of this brief in which it is demonstrated that the evidence establishes with reasonable certainty the amount which respondent is entitled to recover.

ARGUMENT

Summary of Argument

1. Respondent is entitled to recover from petitioners and the Continental Casualty Company in quantum meruit, either the reasonable value of all of the labor

and materials furnished by respondent to petitioners, less what respondent has already been paid, or the reasonable value of the extra labor and materials furnished by respondent plus the sum remaining unpaid on the contract (Petitioners' propositions 1, 2, and 3, Brief 25).

2. The evidence establishes with reasonable certainty the amount which respondent is entitled to recover (Petitioners' proposition 4, Brief 31).

3. The subcontract provision with respect to delays caused by the principal contractors, now petitioners, is no bar to this action (Petitions' proposition 5, Brief 35).

4. The principle which requires anyone injured by a breach of contract to make a reasonable effort to minimize his damage, does not preclude a recovery in this action (Petitioners' proposition 6, Brief 38).

5. Respondent is entitled to a decision that he has capacity to maintain this action (Petitioner's proposition 7, Brief 39).

6. The reasons given by the Court of Appeals in its opinion, if inappropriate, do not form a proper basis for the issuance of a writ of certiorari (Petitioners' proposition 8, Brief 41).

7. The form of the judgment is not such as to justify the issuance of a writ of certiorari (Petitioners' proposition 9, Brief 43).

1.

RESPONDENT IS ENTITLED TO RECOVER FROM PETITIONERS AND THE CONTINENTAL CASUALTY COMPANY IN QUANTUM MERUIT, EITHER THE REASONABLE VALUE OF ALL OF THE LABOR AND MATERIALS FURNISHED BY RESPONDENT TO PETITIONERS, LESS WHAT RESPONDENT HAS ALREADY BEEN PAID, OR THE REASONABLE VALUE OF THE EXTRA LABOR AND MATERIALS FURNISHED BY RESPONDENT PLUS THE SUM REMAINING UNPAID ON THE CONTRACT

The argument under this heading is directed to petitioners' propositions 1, 2, and 3 (Brief 25).

As indicated in the opinion of the Court of Appeals, there are three separate legal theories which fully sustain the right of respondent to recover in quantum meruit. It will be recalled that the court said (173 Fed. 2d 5, 8):

> "Whether the theory is called implied-in-fact contract, quasi-contract, or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit."

Each of these three theories will be briefly stated herein, with the authorities upon which it is based. Respondent contends that each of these, standing alone, is sufficient to warrant the denial of the writ of certiorari in this instance.

A.

Respondent is entitled to recover from petitioners and the Continental Casualty Company in quantum meruit, the reasonable value of the labor and materials furnished by him less the amount he has received, due to the willful breaches of the subcontract by petitioners.

The basis of this contention is that the District Court and the Court of Appeals found the following facts: (1) Petitioners were guilty of willful and negligent, material breaches of the subcontract through the performance of the work by respondent, in the respects mentioned in the statement of the case. (2) Respondent furnished labor and materials and performed services for petitioners at their request of the reasonable cost and value stated in the findings of fact of the District Court (R. 103, 104).

It is established beyond any doubt that where one of the parties to a contract is guilty of a material breach, the injured party may recover the reasonable value of the labor and materials which he furnished to the other party, in quantum meruit.

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2).

Great Lakes Construction Co. v. Republic Creosoting Co., 139 Fed. 2d 456 (C.C.A. 8).

McDonald v. Supple, 96 Or. 486, 190 P. 315.

Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034.

Maryland Casualty Co. v. City of Tacoma, 199 Wash. 72, 90 P. 2d 226.

Schuehle v. City of Seattle, 199 Wash. 675 92 P. 2d 1109.

Bishop v. Ryan Construction Co., 106 Wash. 254, 180 P. 126.

Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4).

Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2).

It is respectfully contended on behalf of respondent that these decisions govern this situation.

Assuming, therefore, that respondent is entitled to recover in quantum meruit, such recovery is not limited to his actual cash expenditures for labor and materials, but he may recover, in addition, reasonable overhead and profit. In other words, respondent is entitled to recover the amount petitioners would have been compelled to pay in the open market for the labor and materials which were actually furnished by him. This is established by the following authorities:

Comment c following Section 347 of the Restatement, declares:

> "If the plaintiff's performance is part of the very performance for which the defendant bargained as part of an agreed exchange, it is to be valued, not by the extent to which the defendant's total wealth has been increased thereby, but by the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered."

There is an excellent discussion of this subject in 5 Williston on Contracts, Section 1480.

This measure of recovery was approved in the following cases:

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2). The court held, in the language of the Restatement, that the plaintiff's performance was to be valued by the amount the services and materials supplied by the plaintiff, "could have been purchased from one in the plaintiff's position" at the time they were supplied. A judgment for the plaintiff was increased and affirmed.

Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2). In reliance upon the same section of the Restatement and 5 Williston on Contracts, Section 1480, the court held that the plaintiff could recover the reasonable value of his services, "measured by what he could have got for them in the market, and not by their benefit to the promisor."

Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4). The court here allowed recovery of overhead.

Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034. The court allowed fifteen per cent for profit, "the going rate on City contracts."

If an injured plaintiff is entitled to recover the market value of the labor and materials furnished by him, it is clear that overhead and profit should be included in the sum awarded him, inasmuch as any one offering to furnish labor and materials in the open market naturally includes overhead and profit in the amount of his offer.

It is evidently asserted by petitioners in their proposition No. 1, as it has been in the past, that there can

be no recovery in quantum meruit in this case for these reasons: (1) Assuming that petitioners were guilty of continuing total breaches of the subcontract, respondent elected to continue his performance and thereby waived his right to regard the breaches as total, and rendered them partial breaches of contract. (2) There can be no recovery in quasi contract following the waiver of such total breaches, and the only remedy available to respondent for the partial breaches of contract is a recovery of damages against petitioners measured by the increased cost of respondent's performance due to such partial breaches of the contract.

Respondent contends that the principle relied upon by petitioners should not be applied in this case for the reason that the breaches of contract by petitioners were willful.

It is an established principle of contract law, having particular application to construction contracts, that a builder is entitled to recover the contract price even though there are some defects or omissions in his performance, if it can be said that he has substantially performed the contract. The owner is then entitled to sufficient compensation from the builder to permit the defects to be corrected or the omissions to be supplied.

> 3 Williston on Contracts, Sections 805 and 842.
> *Patrick v. Bonthius,* 13 Wash. 2d 210, 124 P. 2d 550.

There is an exceedingly important limitation upon this principle, however. It is said by the text writers

and it has been repeatedly held by the courts that the principle does not apply if the builder willfully fails or refuses to perform the contract in accordance with the plans and specifications.

> 3 Williston on Contracts, Section 805.
> *Golwitzer v. Hummel*, 201 Ia. 751, 206 N.W. 254.
> *Typhoon Air Conditioning Co., Inc. v. Fried*, 147 Pa. Super. 605, 24 Atl. 2d 926.
> *Turner v. Henning*, 262 Fed. 637 (Ct. App. D.C.).
> See also *Patrick v. Bonthius*, supra.
> Restatement of the Law of Contracts, Section 357.

The significance of these principles relating to the effect of a willful breach of contract, may be briefly stated:

By reason of their willful breaches of contract, petitioners would not have been entitled to rely upon the doctrine of substantial performance if respondent had not fully performed, and could not, therefore, have secured full performance from respondent in accordance with the terms of the contract, and limited his recovery to damages in an amount sufficient to correct the defects or supply the omissions in petitioners' performance.

That being so, petitioners' only remedy for a failure of performance by respondent would have been an action based upon Section 357 of the Restatement, and their recovery would have been the net benefit conferred by petitioners upon respondent. But the net benefit to respondent was a minus quantity and the principles of quasi contract which give a remedy when necessary to

avoid an unjust enrichment, declare that respondent should recover in quantum meruit from petitioners the difference between the benefits conferred by each of these parties upon the other.

B.

Respondent is entitled to recover from petitioners the amount of his claim, for the reason that an injustice can be avoided only by enforcement of petitioners' promises to pay respondent's costs and expenses, and petitioners are estopped to assert that their promises are not binding upon them, such recovery being in quantum meruit.

This contention is based upon the following established facts: From the beginning, petitioners knew that they were not performing their duties in accordance with the specifications. They knew, furthermore, that respondent was refusing to perform any of petitioners' work and that he was actually unable to do his own until petitioners had completed what they were required to do. In this state of affairs, Mr. Sam Macri promised "to do better." He also promised on two occasions to pay the respondent's costs, but it is not entirely clear whether he promised to pay all of respondent's costs and expenses, or the additional costs and expenses made necessary by petitioners' failure to perform their obligation. There is evidence supporting each view, but it is entirely immaterial which is adopted, as the governing rules of law and extent of recovery are the same in each instance. The District Court intimated that he inclined

toward the latter (R. 103, 2214, 2215), but he actually decided that respondent should recover all costs and expenses less what he had already received (R. 103, 104, 112). Hereafter these promises will be stated to be simply, "to pay respondent's costs and expenses."

Petitioners should reasonably have expected that the promises to pay respondent's costs would induce respondent to do all of petitioners' work which they left undone, in order that respondent might make certain that he could fully perform all of his own obligations. Petitioners knew that respondent himself had executed a performance bond and that he would have been liable to both petitioners and the surety named in such bond in the event of a default on his part. In that event, either the surety or petitioners would have taken over respondent's obligations and performed his contract, with resulting loss of profits and prestige to respondent.

In reliance upon these promises, respondent continued to perform his duties and, in fact, completed everything he was required to do. In so carrying out his own work, respondent performed a considerable portion of petitioners' duties which increased his costs to an amount between two and three times greater than would have been necessary if petitioners had performed according to specifications. Petitioners did not "do better," and performance of the prime contract with the government would have been delayed far beyond its actual completion, if respondent had not done a considerable portion of petitioners' work. Petitioners, of

course, received the full benefit of the labor and materials furnished by respondent.

This theory of respondent is based upon the principle stated in Section 90 of the Restatement of the Law of Contracts in these words:

> "*Promise reasonably inducing definite and substantial action.* A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."
>
> 1 Williston on Contracts, Section 139.
> 3 Williston on Contracts, Sections 679 and 689.

That principle was applied in the following decisions:

Albachten v. Bradley, 212 Minn. 359, 3 N.W. 2d 783.

Fried v. Fisher, 328 Pa. 497, 196 Atl. 39.

Luther v. National Bank of Commerce, 2 Wash. 2d 470, 98 P. 2d 667.

Alameda County Title Insurance Co. v. Panella, 218 Cal. 510, 24 P. 2d 163.

In *Nelson v. City of Seattle*, 180 Wash. 1, 38 P. 2d 1034, 1041, the court said, with respect to a promise made without consideration:

> "Nelson (the general contractor) was anxious to have the work progress with as great speed as possible. Hence his proposal to pay half the rental of the additional tug and allow Vigilant (the subcontractor) the use of the scow without charge. Vigilant having acted upon the oral agreement, Nelson could not thereafter withdraw from it."

It is evident that the facts of this case bring it within the operation of the principle stated in Section 90 of the Restatement and the cases cited. The result is that the promises of petitioners to pay respondent's costs are binding on them, and since they have not performed those promises, respondent is entitled to pursue all appropriate remedies for breach of contract.

Petitioners have paid only about one-third of respondent's total costs and expenses shown by Exhibit 63, the audit which formed the basis for the judgment of the District Court (R. 104, 112, 1241, 1252), and, consequently, none of his extra costs and expenses. It is clear, therefore, that their failure to perform their oral promises constitutes a total breach of such promises within the meaning of Section 317 of the Restatement.

That being true, respondent is entitled to a recovery in quantum meruit, by reason of the principle stated in Section 347 of the Restatement, based on the value of the labor and materials furnished by him.

The correct amount of respondent's recovery is demonstrated in the discussion of contention No. 2 in this brief, on the basis of each view of the testimony with respect to the extent of the promises of petitioners. If they promised to pay all of respondent's costs and expenses, the latter should recover the reasonable value of all labor and materials furnished by him, less what he has already received. If petitioners promised to pay his additional costs and expenses, respondent should recover the reasonable value of all additional labor and materials furnished by him, plus the portion of the con-

tract price remaining unpaid. In either event, he is entitled to overhead and profit in amounts proportionate to his recovery, for the reasons previously stated.

C.

Respondent is entitled to recover from petitioners the reasonable value of the extra labor and materials furnished by him, on the basis of an implied-in-fact agreement to pay for them.

This theory is based upon these established facts: From the beginning petitioners knew that they were not performing their obligations under the subcontract according to the specifications and knew that the respondent was doing a considerable portion of petitioners' work. At the meetings of April 29th and June 15th, 1944, Mr. Macri asked Mr. Schaefer to perform a substantial portion of the work required to be done by petitioners, particularly the fine grading. Mr. Schaefer refused to take over the fine grading. Mr. Macri promised, "to do better" after these meetings, but he failed to show any improvement. It was still necessary, therefore, that respondent do a substantial amount of work required by the subcontract to be done by petitioners, if the prime contract was to be finished within a reasonable time. Respondent, accordingly, continued to do petitioners' work and this was fully known to the latter. Petitioners accepted this work and secured the full benefit of it in the form of compensation from the Bureau of Reclamation. The work done by respondent beyond that which would ordinarily have been required

of him by the subcontract, was not a gratuity on his part. He expected full compensation for it, and a reasonable man in the position of Mr. Macri should have understood that such was respondent's expectation.

In this situation it is believed that the authorities unanimously declare that respondent is entitled to recover from petitioners the reasonable value of the extra labor and materials furnished by him, on the basis of an agreement implied in fact.

Section 72 of the Restatement of the Law of Contracts contains these words:

> "(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:
>
> "(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.
>
> * * * * *
>
> "(2) Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance * * *."

In 1 Williston on Contracts, Section 36, the principle is stated in this manner:

> "Even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable."

See also 1 Williston on Contracts, Sections 36 A, 91, and 91 A.

The decisions fully support the principles set forth in the Restatement and Williston on Contracts.

Western Asphalt Co. v. Valle, 25 Wash. 2d 428, 171 P. 2d 159.

Roberts v. Gerlinger, 124 Or. 461, 263 P. 916.

Vaught v. Charleston National Bank, 62 Fed. 2d 817 (C.C.A. 10).

Hooper v. O. M. Corwin Co., 199 Wis. 139, 225 N.W. 822.

Collins v. Lewis, 111 Conn. 299, 149 Atl. 668.

Callan v. Andrews, 48 Fed. 2d 118 (C.C.A. 2).

Respondent acknowledges that there can be no implied-in-fact contract contrary to an express contract. It is suggested by petitioner that there can be no implied-in-fact agreement on the part of petitioners to pay respondent's costs or any part of them, for the reason that the expressed intentions of these parties are inconsistent with such an implied agreement. Petitioner now relies particularly upon Mr. Schaefer's expressed intention that he would not take over the fine grading of the excavations.

Petitioners have quoted (Petition 10) from that portion of the opinion of the District Court, in which the court said that he could not find that there was a meeting of the minds or an express contract that Mr. Schaefer was to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid the reasonable value of all his costs. The basis of this finding by the court was simply that Mr. Schaefer refused to promise to carry out the fine grading and excavating when Mr. Macri

offered to turn it over to him. The court added that Mr. Schaefer continued to complain. The court concluded by saying that Mr. Schaefer's conduct was not consistent with a meeting of the minds and an express contract that Mr. Macri was to pay Mr. Schaefer the fair value of his services.

There are two very clear reasons why this finding of the court is not inconsistent with an implied-in-fact agreement on the part of petitioners to pay respondent the reasonable value of the labor and materials furnished by him.

First, a finding that there was no express contract or meeting of the minds that respondent was to perform all or a part of the fine grading, simply means that there was no bilateral contract by the terms of which respondent promised to do that work. A finding that there was no bilateral contract and consequently no promise by respondent to do the work, is clearly not inconsistent with the existence of a unilateral contract by the terms of which an agreement may be implied in fact on the part of petitioners, to compensate respondent for the work which he actually performed. It is conceded that respondent did not expressly agree to do any fine grading, but that does not mean that if, through necessity, he was compelled to do some fine grading in order to get the job done, he should not be compensated for it on the basis of a unilateral contract implied in fact.

Second, the refusal of Mr. Schaefer to undertake the excavating and fine grading was in answer to Mr. Macri's request that Mr. Schaefer take over all the ex-

cavating and fine grading, not simply that he take over the fine grading required by reason of the defective condition of the excavations.

Petitioners evidently contend further that there can be no recovery here on an implied or quasi contract, inasmuch as the rights of these parties are governed by the subcontract executed by them, at least in an amount greater than the compensation specified in such subcontract. The proposition advanced is without any merit, however, because of the fact that respondent performed additional work at the request of petitioners under such circumstances as to create a unilateral contract by petitioners to pay respondent for such work.

It is said that a recovery on the common counts, following a breach of contract, is limited to the compensation stated in the contract. This proposition is of no value to petitioners. Here, a contract or contracts arose by which petitiners agreed to pay respondent's costs and expenses, and respondent is simply seeking to enforce such contract or contracts. The proposition relied upon, therefore, has been fully met.

Petitioners also contend that respondent was not entitled to rescind the subcontract and recover in quantum meruit. Respondent did not rescind that contract, however, nor was the decision of either court below based upon a rescision. Such decisions were based upon the fact that respondent fully performed the subcontract and supplied additional labor and materials for which he is entitled to compensation.

2.

THE EVIDENCE ESTABLISHES WITH REASONABLE CERTAINTY THE AMOUNT WHICH RESPONDENT IS ENTITLED TO RECOVER

The argument under this heading is directed to petitioners' proposition 4 (Brief 31).

The decision of the Court of Appeals with respect to the amount of recovery is found in these words (173 Fed. 2d 5, 9):

> "Schaefer introduced a statement of costs prepared by a certified public accountant which showed all Schaefer's costs on this project. From this amount was subtracted the amount the Macris had paid on account and judgment was rendered for the difference. There was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated, and this amount was substantially the same as the amount of Schaefer's bid, so the increased costs of Schaefer were properly computed by reference to this statement. In the light of this evidence we cannot say that the finding of the trial court was erroneous. The judgment in favor of Schaefer against the Macris is affirmed."

The statement of costs referred to by the court in that quotation is Exhibit 63, the audit prepared by a certified public accountant at respondent's request (R. 1241, 1243, 1251, 1252).

It has already been shown in the argument under heading No. 1 in this brief that respondent should be allowed to recover on three separate theories. These will now be considered separately to demonstrate that the amount of the judgment can be sustained on each.

A.

Recovery in quantum meruit of all respondent's costs and expenses, together with overhead and profit, based upon petitioners' willful and continuing breaches of the subcontract.

The District Court found that the value of the labor and materials furnished and services rendered for which petitioners were chargeable, was as shown in Exhibit 63; and the court allowed all the items set forth therein with the exception of interest and two minor items (R. 103, 104). Petitioners have not attacked the accuracy of this audit, nor have they contended that it does not show respondent's actual costs and expenses. Petitioners do contend that respondent should not be permitted to recover overhead and profit, but that contention has already been answered under subdivision A of heading 1 of this brief.

Petitioners now contend, however, for the first time, that the judgment was based upon simply a compilation, Exhibit 63, and not upon respondent's original books and records (Brief 4, 34). All of his original books and records relating to this project were produced in open court, however, and counsel for petitioners could have studied them and used them in their examination of any witness (R. 1251).

There is substantial evidence establishing the items of overhead and profit. The accountant who prepared Exhibit 63 testified that he fixed overhead at 20% of the total direct costs because the true percentage, which

he ordinarily used, was too high for a business of this kind (R. 1239, 1251, 1259, 1269). This was undoubtedly due to respondent's most unfortunate experience on this project. The accountant then stated that he computed the profit at 10% of the total of the direct costs and overhead, as most cost-plus jobs in the construction field are figured on that basis. He added that it had been respondent's practice to bill on that basis, and to include overhead in his cost (R. 1272, 1273).

It cannot be seriously contended, therefore, that respondent has not met the burden of proof with respect to the measure of his recovery on the theory set forth under this subdivision A.

It is respectfully submitted, therefore, that respondent's recovery should be computed as follows, if this theory is adopted:

(a) Respondent's total direct costs allowed by the court	$67,712.84
(b) Overhead—20% of (a)	13,542.57
(c) Respondent's total costs—(a) plus (b)	81,255.41
(d) Ten per cent profit	8,125.54
(e) Total costs, overhead and profit—(c) plus (d)	89,380.95
(f) Amount paid by petitioners	32,614.66
(g) Total amount due and unpaid—(e) minus (f)	$56,766.29

This figure varies slightly from the amount of the judgment due to an error in calculation at the conclusion of the trial.

B.

Recovery based on the principle that an injustice can be avoided only by enforcement of petitioners' promises to pay respondent's costs, and petitioners are estopped to assert that their promises are not binding upon them.

As previously pointed out, it is not entirely clear whether Mr. Macri promised Mr. Schaefer to pay all of respondent's costs, or only his extra costs due to petitioners' breaches of the subcontract. The District Court allowed all of respondent's costs and expenses together with overhead and profit, less what he received. In affirming the amount of the recovery, the Court of Appeals said (173 Fed. 2d 5, 9):

> "* * * the increased costs of Schaefer were properly computed by reference to this statement (Exhibit 63)."

If, under the theory set forth under this subdivision B, respondent is entitled to recover all of his costs and expenses together with overhead and profit, less what he has received, it is clear that the judgment should be affirmed, for the reasons stated in subdivision A.

If, on the other hand, respondent is entitled to a judgment for the amount specified in the subcontract, less what he received, and in addition thereto his extra costs and expenses, there is ample testimony in this record to support the judgment. The following discussion deals only with the latter recovery, i.e., for the additional costs and expenses, and the corresponding

overhead and profit.

Petitioners contend that the respondent failed to keep a separate account of his increased costs and that he failed to introduce any evidence of their extent at the trial. It is further contended that the respondent, not having met the burden of proof, is entitled to recover nothing.

The decisions cited by petitioners will be briefly considered later in this brief.

There are two answers to these contentions, although it is conceded that respondent did not keep a separate account of his extra costs.

In the first place, the breach of contract by petitioners was willful and negligent and was of such character as to render precise computations of extra costs economically and in most situations physically impossible.

The extra work done by respondent consisted in the following:

Fine grading the excavations to the proper level; removing earth from the walls of the excavations to give them more slope and permit the forms to be inserted properly; removing earth or cribbing and back-filling, where the walls were not properly excavated to the neat concrete line; removing from excavations, panels assembled into structures, when it appeared that the excavations had not been dug to the proper grade, and reassembling such panels in the excavations after additional fine grading; removing the forms under adverse

conditions after the concrete had set; taking the forms back to the yard in order that they might be rebuilt, and returning them to the next excavation; rebuilding panels to a different size because of a lack of lumber and the vertical walls of the excavations; additional use of trucks; additional use of other equipment; additional supervision, that is, a superintendent and foreman were required for a much longer period than would have been necessary under normal conditions.

It is evident that from the nature of the operation and the extra work done, it would have been economically, and in most instances physically impossible to have kept an exact account of all these extra costs. Mr. Schaefer testified that with respect to part of such extra operations it was a physical impossibility to establish a dividing line between what was work required by the subcontract and what was additional work (R. 1368).

In the second place, respondent did produce very substantial evidence of additional costs, and it is respectfully submitted that such evidence fully meets the requirements established by the Supreme Court which will be discussed.

This evidence consisted in the testimony of several witnesses and Exhibits 51 (R. 572, 578, 586) and 63 (R. 1241, 1243, 1251, 1252). Exhibit 51 shows the estimated time of performance of all aspects of his work: constructing forms, pouring concrete, and stripping the forms. It also shows the daily progress of the work by means of cumulative percentages of the total to be done

in each of these three categories. It also indicates exactly how many men were employed each day and in what work they were primarily engaged. Exhibit 63 is the audit prepared by the certified public accountant at respondent's request, setting forth all of his costs and expenses itemized by months.

Mr. L. E. Bufton, an engineer of uncommon experience in the field of concrete construction (R. 1133 to 1139), testified that after examining the specifications covering this job, the work required of respondent under the subcontract could have been performed by him, if petitioners had performed their obligations under the subcontract, in not more than four months (R. 1160, 1161, 1162). He added that to accomplish this in four months, he would need an average of 25 men per day (R. 1216), which means, assuming 25 working days in each month, 2,500 man-days would have been required.

By means of a hypothetical question setting forth the details of the conditions under which respondent was compelled to do his work, Mr. Bufton was asked how and to what extent the conditions mentioned would affect the reasonable cost and value of the performance by respondent (R. 1167, 1168, 1169). His answer was that he could not state the additional costs in dollars and cents but that he felt that the cost might be from two to three times as much as it should have been under normal conditions (R. 1172 to 1175).

Finally, Mr. Bufton said that he figured the reasonable cost and value of the performance of the work undertaken by respondent, assuming that the Macris per-

formed their obligations as required by the subcontract, would be $27.88 per cubic yard. He added that this figure included an allowance for the services of the subcontractor himself and overhead. By overhead he said he meant home office and general supervision (R. 1162, 1163, 1164). Mr. Bufton also referred to a similar project in Oregon. He said the subcontractor carrying out the concrete work in that instance had bid $30.00 per cubic yard with the understanding that he would furnish all the lumber for forms (R. 1141, 1142, 1143). Respondent here testified that his bid of $26.00 per cubic yard would have been raised to $30.00 if he had been required to furnish the lumber (R. 419). Thus their bids were in the same amount.

Mr. Darcy, respondent's superintendent, testified that if the excavations had been ready with the banks on a one-to-one slope and a lateral clearance of one foot at the foundation of the structure, and lumber had been furnished of proper quality and on time, no more than three and a half months at the very outside would have been necessary to complete the job (R. 464). Actually a year and three weeks were required.

Exhibit 51 clearly indicates that this job could have been completed within three and a half months or at least within the four months specified by Mr. Bufton, if petitioners had faithfully performed the subcontract. That exhibit shows the following actual performance by respondent during the periods indicated:

> Form setting, from Feb. 9, 1945, to Mar. 8, 1945, the most productive month—17½ per cent of

the entire job.

Pouring concrete, from Mar. 1, 1945, to Mar. 30, 1945, the final 30 days—30 per cent of the entire job.

Stripping forms, from Mar. 5, 1945, to Apr. 4, 1945, the final month—39 per cent of the entire job.

The figures demonstrate that so far as pouring concrete and then stripping the forms were concerned, operations in which respondent was not directly dependent on petitioners, respondent could have performed all of the work contemplated by the subcontract in 100 days of elapsed time. During no month was he able to construct in the excavations more than 17½ per cent of the entire number of forms required on this project, but it appears from Exhibit 51 that in seven days of actual time and eight days of elapsed time, from January 19, 1945, to January 26, 1945, respondent's men were able to set 6½ per cent of the entire number of forms, and that on each of sixteen other days, widely scattered, they set one per cent or more of the total number. It was in the setting of the forms in the excavations that the breaches of petitioners created the most serious obstacle to respondent.

Exhibit 51 establishes by means of the following computation that respondent actually demonstrated the capacity to complete the work in the same or less time and with less men than Mr. Bufton estimated:

Form setting (including yard, form setting, field repair, and trucking crews)—6½% of the work required 107 man-days.

Concrete pouring—30% of the work required 176 man-days.

Form stripping—30% of the work required 34 man-days.

All types of work—100% would require 2,346 man-days.

One other fact is worthy of mention: The ratio of respondent's demonstrated performance of 2,346 man-days to Mr. Bufton's estimated performance of 2,500, is 94/100. The ratio of respondent's bid per cubic yard of $26.00 to Mr. Bufton's estimate of $27.88, is 93/100. The significance of this fact is that it establishes that respondent's bid may properly be used as a basis for a computation of the amount for which the work could have been done.

Respondent's extra costs may be determined with reasonable certainty from the testimony and exhibits just considered, by two separate computations:

1. Based on the difference between respondent's actual, total costs and his estimated costs.

(a)	Respondent's bid, per cubic yard	$ 26.00
(b)	Respondent's estimated costs, eliminating 10% profit but not overhead—10/11 of (a)	23.64
(c)	Number of yards poured for which compensation was paid to petitioners—Exhibit 14 (R. 160)	1,356.697
(d)	Respondent's estimated costs, including overhead but not profit—(b) multiplied by (c)	32,072.32
(e)	Respondent's total, actual costs including 20% overhead — (c) of	

table in subdivision A	81,255.41
(f) Respondent's extra costs including 20% overhead—(e) minus (d)	49,183.09
(g) Ten per cent profit	4,918.31
(h) Total extra costs and profit—(f) plus (g)	$54,101.40

To this should be added, of course, the amount which remains unpaid under the subcontract.

(i) Amount required by the subcontract to be paid — (a) multiplied by (c)	$35,274.12
(j) Amount paid by petitioners	32,614.66
(k) Balance remaining unpaid — (i) minus (j)	2,659.46
(l) Total amount due and unpaid on this basis—(h) plus (k)	$56,760.86

It will be observed that this is $4.11 less than the amount of the judgment.

2. Based on Mr. Bufton's estimate that the total cost might be from two to three times as much as it should have been under normal conditions.

A figure of two and one-half was adopted in making this computation, which means that the extra costs are assumed to be one and one-half times the costs under normal conditions.

(a) Respondent's estimated costs, including 20% overhead but not profit—(d) of previous table in subdivision B	$32,072.32
(b) Total costs based on Mr. Bufton's estimate of rate increase, but respondent's estimate of costs, in-	

cluding 20% overhead—(a) multiplied by 1½	48,108.48
(c) Ten per cent profit	4,810.85
(d) Total extra costs and profit—(b) plus (c)	52,919.33
(e) Balance remaining unpaid on subcontract—(k) of previous table in Subdivision B	2,659.46
(f) Total amount due and unpaid on this basis—(d) plus (e)	$55,578.79

This is $1,186.18 less than the amount of the judgment, but it would be substantially increased by using Mr. Bufton's estimated cost of $27.88 per cubic yard, or adopting his estimated increase of three times the cost under normal conditions.

It is respectfully submitted that the evidence, as thus analyzed, fulfills the requirements of the Supreme Court with respect to the character of proof required to sustain a money judgment.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187, was an action for overtime compensation under the Fair Labor Standards Act. The Circuit Court of Appeals reversed a judgment entered in favor of the plaintiff in the District Court, for the reason that the evidence of the extent of his overtime work was conjectural. The Supreme Court reversed the Circuit Court of Appeals and affirmed the judgment of the District Court, saying:

> "* * * here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies

> only in the amount of damages arising from the statutory violation by the employer. In such case, 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts.' * * * It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574, was an action under the Sherman and Clayton Acts for an injunction and to recover treble damages. The Supreme Court affirmed the judgment for the plaintiffs entered in the District Court, although the evidence of damages sustained by the plaintiffs consisted simply in a comparison of the plaintiffs' receipts before and after the defendant's wrongful acts. In reversing the Circuit Court of Appeals for the Sixth Circuit, the court said:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof.' "

Petitioners contend that respondent has not met the burden of proof established by Washington law. The cases cited by them are either inapplicable or strictly in accord with the Anderson and Bigelow cases just discussed. Respondent contends that these two decisions govern this situation rather than the law of Washington, but will consider briefly petitioners' contentions.

First, it is said (Brief 31) that the Washington Supreme Court has declared that there must be a segregation of extra costs from the costs otherwise current in performance of the subcontract. It is then inferred that since respondent made no such segregation, he is not entitled to recover.

The decision cited, *Nelson v. City of Seattle,* 180 Wash. 1, 38 P. 2d 1034, does not require a segregation of costs. The court simply remarked, in deciding that the claimant had not established his right to a recovery, that he had made no attempt to segregate his costs. The court also stated that he had included all costs in his income tax return, and that, more important, he had never made a protest to the general contractor. A further distinguishing feature is that the general contractor in that case was not guilty of willful breaches of contract of such character as to render the segregating of costs physically and economically impossible, as in the present case.

Respondent contends, therefore, that if he has met the burden of proof through introduction of other evidence, it is immaterial that he did not segregate his costs.

Second, it is contended by petitioners (Brief 32) that since respondent accepted payments throughout his performance on the basis of the compensation provided for in the subcontract, there is a presumption that he accepted such amounts in full payment for all the work done including the extras, and such presumption can be overcome only by proof of the clearest and

most convincing character.

The case cited, *Ammerman v. Old National Bank*, 28 Wash. 2d 239, 182 P. 2d 75, certainly does not establish any such proposition so far as the present situation is concerned, which these distinguishing features clearly demonstrate:

(a) That action was brought by the plaintiff against the executor of the estate of her deceased employer for services rendered to the latter during her lifetime. It is evident that this is the real basis for the decision.

(b) The employer did not promise to pay for the extra services.

(c) During the lifetime of the employer, the plaintiff made no claim or suggestion that she be compensated for such services.

The court stressed this requirement:

> "There must be evidence from which it can be inferred that while the services were being performed the plaintiff intended to charge and the defendant intended to pay."

In the present case both courts below have found that respondent intended to charge and that petitioners said they intended to pay. Petitioners well knew, furthermore, while the work was in progress, that respondent was not satisfied with the contract payments he was receiving. In January, 1945, a meeting was held in Seattle, attended by Mr. Sam Macri, Mr. Schaefer, and their attorneys, to arrive at a new price, if possible, for respondent's performance. They were unable to reach an agreement (R. 2202).

None of the remaining cases cited by petitioners merits discussion, with the exception of one, *Automatic Canteen Co. of Washington v. Automatic Canteen Co. of America,* 182 Wash. 133, 45 P. 2d 41, in which the court held that damages for loss of future profits may be allowed if the amount of the loss is established with reasonable certainty. This is exactly the burden of proof specified by the Supreme Court of the United States in the Anderson and Bigelow cases heretofore considered.

In *United States v. Wyckoff Pipe & Creosoting Co.,* 271 U.S. 263, 70 L. Ed. 938, 46 S. Ct. 503, and others, the evidence relating to the extent of recovery was purely speculative and conjectural. It has already been demonstrated beyond doubt that in the present case the amount which the respondent is entitled to recover has been established with reasonable certainty, taking into account the willful breaches of petitioners.

C.

Recovery based on the implied-in-fact agreement of petitioners to pay respondent's costs.

It is probable that the implied-in-fact agreement is limited to an undertaking by petitioners to pay all of respondent's additional costs and expenses. Inasmuch as his claim was unliquidated, he has a right to recover in quantum meruit or by specific performance of the agreement. In either event his recovery is the same, and the evidence amply justifies the denial of the writ,

as was pointed out fully in the discussion under subdivision B.

3.

THE SUBCONTRACT PROVISION WITH RESPECT TO DELAYS CAUSED BY THE PRINCIPAL CONTRACTORS, NOW PETITIONERS, IS NO BAR TO THIS ACTION

The argument under this heading is directed to petitioners' proposition 5 (Brief 35).

Petitioners contend that this action is barred by paragraph 5 of the subcontract which is quoted in petitioners' brief, page 35, and that the respondent's only remedy was to secure additional time within which to perform his obligations.

This contention is entirely without merit and the decisions cited are wholly inapplicable for these reasons:

(a) Neither petitioners nor the Continental Casualty Company raised this question in their pleadings, nor was it presented to the Court of Appeals.

(b) Respondent is not seeking damages for delay but is attempting to recover the reasonable value of the labor and materials furnished by him to petitioners.

(c) Petitioners waived this provision of the subcontract by agreeing to pay respondent's costs, thereby leading respondent to believe that petitioners did not intend to rely upon this provision of the subcontract.

Ross Engineering Company v. Pace, 153 Fed. 2d 35 (C.C.A. 4).

(d) Paragraph 5 of the subcontract was wholly abrogated due to the fact that, upon the performance of the extra work by respondent, a unilateral contract arose by which he was to be compensated for such work.

4.

THE PRINCIPLE WHICH REQUIRES ANYONE INJURED BY A BREACH OF CONTRACT TO MAKE A REASONABLE EFFORT TO MINIMIZE HIS DAMAGES, DOES NOT PRECLUDE A RECOVERY IN THIS ACTION

The argument under this heading is directed to petitioners' proposition 6 (Brief 38).

Here again, petitioners completely ignore the findings made by the District Court and the Court of Appeals that petitioners promised to pay all of respondent's extra costs and expenses. Petitioners made such promises under such circumstances as to create a unilateral contract to pay for respondent's costs and expenses upon the performance of the extra work. Respondent performed as he was asked to do, and he did nothing he was not required to do, to complete that performance. Petitioners cannot now complain that respondent did as he was asked to do, particularly since petitioners were well aware over a period of many months that respondent was performing the extra work.

Under such circumstances it certainly cannot be said that respondent failed to minimize his damages.

5.

RESPONDENT IS ENTITLED TO A DECISION THAT HE HAS CAPACITY TO MAINTAIN THIS ACTION

The argument under this heading is directed to petitioners' proposition 7 (Brief 39).

Petitioners contend that respondent is not entitled to maintain this action for the reason that he failed to file the assumed-name certificate required by Remington's Revised Statutes of the State of Washington, Section 9976, prior to the trial. It is said that this failure on his part precludes him from maintaining this action, by reason of the provisions of Section 9980 quoted in petitioners' brief, page 39.

This contention has no merit whatever. Rule 17(b) of the Rules of Civil Procedure declares:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile."

Respondent resided and was domiciled in Portland, Oregon, when this action was commenced, when the amended complaint was filed and at the time of the trial. He also maintained his office in that city and state (R. 3, 178, 181).

The controlling question, therefore, is whether the law of Oregon has given respondent capacity to sue. The statutory requirements of Washington have no effect whatever upon its determination.

Counsel for petitioners have never asserted that respondent has no capacity to sue because of his failure to meet any requirement of the Oregon law. By failing to make such contention either by motion or in their answer, petitioners have waived the right to assert it.

Rule 9(a) of the Rules of Civil Procedure states:

> "It is not necessary to aver the capacity of a party to sue * * * except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to * * * the capacity of any party to sue * * * he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

Respondent complied with the requirement of the first sentence of Rule 9(a). The amended complaint contains sufficient averments to show the jurisdiction of the court in that it alleges every fact upon which the jurisdiction of the District Court depends under the Miller Act, and alleges a cause of action in favor of respondent under that act.

On the other hand, counsel for petitioners have failed to comply with the requirement of the second sentence of Rule 9(a) in that they have never contended in a motion or in their answer that the law of respondent's domicile, the State of Oregon, has not conferred upon him the capacity to sue in the District Court.

All defendants had knowledge that M. C. Schaefer was an individual doing business as the Concrete Construction Company, that he was the sole owner of such business, and that he was a resident of the State of Oregon, inasmuch as these facts were alleged in paragraph II of his amended complaint, filed January 24, 1946 (R. 3). Actually, petitioners admitted that allegation in their answer (R. 13), without questioning respondent's capacity to sue.

It is established that under these circumstances petitioners have waived the right to question the capacity of respondent to maintain this action.

> *Trounstine v. Bauer, Pogue & Co., Inc.*, 144 Fed. 2d 379 (C.C.A. 2), cert. den. 323 U.S. 777.
>
> *Kucharski v. Pope & Talbot, Inc.*, 4 Fed. R. Dec. 208 (D. Ct. N.Y.).
>
> *Chemacid v. Ferrotar Corp.*, 3 Fed. R. Dec. 45 (D. Ct. N.Y.).

It was held in *Kucharski v. Pope & Talbot, Inc.*, supra, that the defendant waived its right to object to the capacity of the plaintiff to sue, by failing to raise the question until after the statute of limitations had run against the plaintiff's claim. In the present case, the Miller Act itself, 40 U.S.C.A., Section 270 b, imposes a limitation on actions brought under its provisions, of one year after the date of final settlement of the prime contract. The bar of the statute was complete, therefore, on March 31, 1946 (R. 104), approximately one year before the trial of this case was commenced. Petitioners did not raise this question until after the trial was commenced.

This strengthens the conclusion that petitioners have waived the right to raise this question.

It should be added that during the trial, before the respondent rested his case, a proper assumed-name certificate was regularly filed in Yakima County, Washington, and a certified copy of it was received in evidence as Exhibit 59 (R. 670, 673).

Petitioners contend that the state law of Washington governs this question rather than Rule 17(b) of the Rules of Civil Procedure.

Petitioners do not cite any Washington decisions, however, which establish that an assumed-name certificate filed while a trial is in progress, is not sufficient to permit the action to be maintained. This question has evidently never been decided by the Supreme Court of Washington.

Section 9980 of the Washington statutes declares that no person shall be entitled to "maintain any suit" without alleging and proving that he has filed the necessary certificate. The word "maintain" does not mean "commence," but rather "continue." Webster's New International Dictionary, Unabridged Edition, defines "maintain" as follows: "to continue or persevere in or with; to carry on; as, to maintain an attack, a correspondence, a legal action."

The statute really means, therefore, that no suit shall be continued to its conclusion unless the certificate is filed. If that is true respondent has met the requirement of this section by alleging and proving the filing

of the certificate during the trial, the amended complaint having been amended to show the filing (R. 673).

If this conclusion is unsound, respondent contends that the Rules of Civil Procedure govern and not the state law of Washington.

In the cases cited by petitioners jurisdiction was based solely on diversity of citizenship and not upon a federal statute. In the present case it is conceded by all that jurisdiction is based entirely on a federal statute. Section 270(a), of Title 40, U.S.C.A., requires a payment bond to be given by every general contractor on any public work exceeding $2,000.00 in amount. Section 270(b) of the same title permits actions to be brought on such payment bond by every person who has furnished labor or material in the prosecution of the work, and requires every action instituted under that section to be brought in the United States District Court.

Respondent is seeking to enforce rights created by federal statute, and respectfully contends that the Rules of Civil Procedure govern his capacity to sue in the District Court. Respondent was required to sue in that court and it appears conclusive, therefore, that his capacity to sue is governed solely by the rules governing procedure in that court.

6.

THE REASONS GIVEN BY THE COURT OF APPEALS IN ITS OPINION, IF INAPPROPRIATE, DO NOT FORM A PROPER BASIS FOR THE ISSUANCE OF A WRIT OF CERTIORARI

The argument under this heading is directed to petitioners' proposition 8 (Brief 41).

It is established beyond doubt, of course, that if the judgment of a trial court or an appellate court is proper, the reasons assigned by either of such courts as a basis for its judgment, are immaterial. Consequently, if a judgment is proper, erroneous reasoning is entirely harmless and cannot form the basis for a reversal of the judgment.

7.

THE FORM OF THE JUDGMENT IS NOT SUCH AS TO JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI

The argument under this heading is directed to petitioners' proposition 9 (Brief 48).

If it could be said that this judgment was not drawn with the technical nicety desired by petitioners, it is so fundamental that no part of the judgment should be paid twice by any party to this case that the Supreme Court can safely rely upon counsel to make certain that this does not occur. Principles of law come to the aid

of petitioners as surely and effectively as the terms of any judgment.

If petitioners or the Continental Casualty Company pay any sum to the Government to satisfy the tax lien arising out of respondent's indebtedness to the Government, clearly that amount will not be paid to respondent nor be demanded by him. The judgment must be deemed satisfied to the extent of such payment to the Government.

If petitioners satisfy the judgment in favor of respondent, it is clear that the judgment in favor of the Continental Casualty Company and against petitioners will be void and of no effect. If the Continental Casualty Company satisfies the judgment, it is equally clear that that company is entitled to satisfaction from petitioners, to the extent of the payment made by the Continental Casualty Company to respondent.

Respectfully submitted,

OLSON & PALMER
CUTLER W. HALVERSON,
Miller Building,
Yakima, Washington;

STUART W. HILL,
Equitable Building,
Portland, Oregon,
Attorneys for Respondent.